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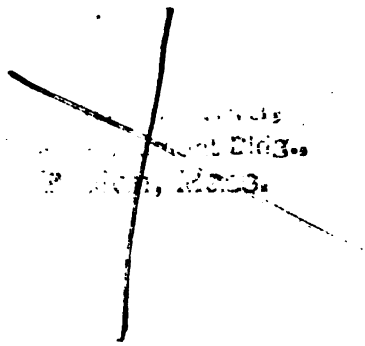

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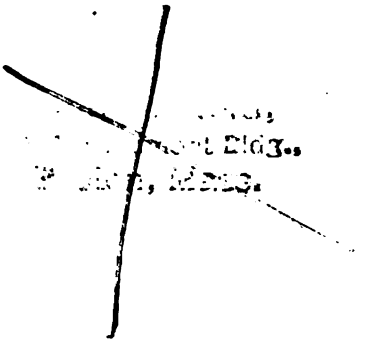

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MASSACHUSETTS REPORTS

175

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

NOVEMBER 1899 — MARCH 1900

GEORGE F. TUCKER

REPORTER

BOSTON

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. JAMES M. MORTON.
HON. JOHN LATHROP.
HON. JAMES M. BARKER.
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HON. WILLIAM CALEB LORING.

ATTORNEY GENERAL.

HON. HOSEA M. KNOWLTON.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

WILLIAM C. LUNT *vs.* GEORGE W. COOK.

Essex. November 9, 1899. — November 29, 1899.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Levy on Equity of Redemption from Mortgage — Subsequent Purchase by Mortgagor at Foreclosure Sale — Acquisition of Title.

If the equity of redemption in mortgaged premises is levied upon, and afterwards the mortgagor purchases the premises at a sale under a power in the mortgage, the deed to him operates as a conveyance of the title and not as a discharge or release of the mortgage, and a deed of the officer who subsequently sells the equity of redemption previously levied upon is of no effect.

WRIT OF ENTRY, dated August 11, 1898, to recover a parcel of land in Haverhill. Plea, *nul disseisin*. Trial in the Superior Court, without a jury, before *Sherman*, J., who reported the case for the determination of this court, in substance as follows.

The demandant offered the following evidence.

A warranty deed from William M. Bowley and others to the tenant, dated May 15, 1897, and recorded, conveying five undivided sixth parts of the demanded premises, and a deed from George A. Hall, guardian, to the tenant, dated May 29, 1897,

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and recorded, conveying one undivided sixth part of the demanded premises, and being in the form commonly used by guardians. In both of these deeds the grantee was described as George Ward Cook, trustee, and the habendum was "to the said George Ward Cook, trustee, and his heirs and assigns, to their own use and behoof forever." Neither of these deeds contained any words indicating a trust, excepting the description of the grantee as George Ward Cook, trustee. An execution issued on a judgment recovered by the demandant on April 22, 1898, against the tenant, described as George Ward Cook, in an action brought in the police court of Haverhill. It appeared by the officer's return on the execution that on February 19, 1898, he had attached all the interest of the tenant in real estate in the Southern District of Essex County, in which Haverhill is situated; and that on May 21, 1898, he levied the execution on the tenant's right in equity of redeeming the demanded premises. Further service of this execution was then suspended on account of prior attachments. On June 21, 1898, the prior attachments having been dissolved, the officer proceeded with and completed the levy, as required by law. On July 28, 1898, he sold the tenant's right in equity of redeeming the demanded premises to Harriett L. Jewett. A deed from Fred O. Raymond, Jr., deputy sheriff, to Jewett, dated July 28, 1898, and recorded, conveying all the tenant's right in equity of redeeming the demanded premises which he had on February 19, 1898, when the same was attached. A quitclaim deed in common form of the demanded premises from Jewett to the demandant, dated August 10, 1898, and recorded. A mortgage of the demanded premises given by the tenant, described as George Ward Cook, trustee, to Bowley, dated May 29, 1897, and recorded, containing covenants of warranty and seisin, and also containing a power of sale in the ordinary form. A deed of the demanded premises under the power in the mortgage above mentioned to the tenant, described as George Ward Cook, agent, dated June 22, 1898, and recorded, and an affidavit stating that the sale under the mortgage was made on June 22, 1898. The habendum in the deed was "to have and to hold the same to the said George Ward Cook, agent, and his heirs and assigns, to their own use and behoof forever."

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The tenant offered in evidence a certificate of an entry to foreclose the mortgage given by the tenant to Bowley, above mentioned.

The demandant requested the following rulings: "1. The deeds from George A. Hall, guardian, and from William M. Bowley and others to George W. Cook, trustee, did not create an estate in trust. 2. The deeds from George A. Hall, guardian, and from William M. Bowley and others to George Ward Cook, trustee, conveyed an absolute title to George Ward Cook. 3. The evidence is not sufficient to establish a trust estate. 4. The deed from William M. Bowley to George Ward Cook, agent, dated June 22, 1898, and recorded with Essex South District Deeds, operated as a discharge of the mortgage given by George Ward Cook and mentioned in said deed. 5. The words 'trustee' and 'agent' in the deeds do not affect the construction of the deeds. 6. The words 'trustee' and 'agent' as used in the deeds have no significance, and must be rejected as surplusage. 7. As matter of law, upon the evidence the demandant is entitled to judgment. 8. As matter of law, upon the evidence the tenant is not entitled to judgment."

The judge made all the rulings requested by the demandant, except the fourth, seventh, and eighth; and being of opinion that when the levy became complete it took effect as of May 21, 1898, and that from that date the tenant could acquire an independent title to the property by purchase from the mortgagee, found for the tenant.

The demandant excepted to the refusal to give the fourth, seventh, and eighth rulings, as requested.

If those requests were properly refused, and the finding for the tenant was correct, judgment was to be entered for him; otherwise, judgment was to be ordered for the demandant.

F. H. Pearl, for the demandant.

H. J. Cole, for the tenant.

MORTON, J. The effect of the levy was to divest the tenant of the equity of redemption. *Capen* v. *Doty*, 13 Allen, 262. Pub. Sts. c. 172, § 45. St. 1896, c. 464, § 1. All that remained to the tenant was the right to redeem from the levy. Pub. Sts. c. 172, § 32. This was taken away by the foreclosure proceedings, and the deed under the power of sale contained in the

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mortgage operated as a conveyance of the title to the tenant, and not as a discharge or release of the mortgage. The doctrine of merger does not apply. The rulings which were requested and refused were rightly refused.

Judgment for the tenant.

JAMES F. DICKEY, administrator, *vs.* CATHERINE P. TAFT.

Hampden. November 15, 1899. — November 29, 1899.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Statute as to Fraudulent Conveyances applied to Lands.

Section 1 of Pub. Sts. c. 133, as to persons suspected of having fraudulently received, conveyed, etc., any estate of a deceased person relates to fraudulent conveyances of real estate, and the administrator and the estate are in such circumstances as to give him a right to make the complaint under the statute, where the estate has been represented insolvent, and there is an allegation that a sale of the testator's real estate is necessary for the payment of debts.

PETITION to the Probate Court by the administrator *de bonis non* with the will annexed of the estate of Edward C. Taft for the examination of the respondent under Pub. Sts. c. 133, § 1, relating to persons suspected of having fraudulently received, concealed, embezzled, or conveyed away any estate, real or personal, of a deceased person, as to certain real property of Edward C. Taft, alleged to have been "fraudulently received, concealed, and conveyed away" by the defendant.

The respondent filed a motion to dismiss on the ground that the statute did not apply to lands. The Probate Court denied the motion and ordered the respondent to appear for examination; and the respondent appealed. Hearing before *Knowlton*, J., who by agreement of the parties reported the case for the consideration of the full court.

W. H. Brooks & W. Hamilton, for the respondent.

J. B. Carroll & W. H. McClintock, for the petitioner.

BARKER, J. We need not inquire whether a complaint under Pub. Sts. c. 133, § 1, can be brought by any administrator. See St. 1857, c. 71, § 2. In this instance the estate has been rep-

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resented insolvent, and there is an allegation that a sale of the testator's real estate is necessary for the payment of debts. Under these circumstances the complainant may resort to the statute.

The objections urged are untenable. Several of them are upon the theory that the statute does not apply to lands, whereas it expressly authorizes the complaint in case of real estate fraudulently conveyed. It is idle to say that the accused could not convey away the testator's estate, for, like any other person, she might hold and convey fraudulently a title. The purpose of the statute is to compel the disclosure of information as to transactions suspected to be fraudulent, and it would be absurd to require the complainant, by allegations in the complaint, to set out for the benefit of the accused his own partial knowledge or his suspicions as to particulars of the fraud. The effect of the statute is to give the right to complain to the person who is administrator, and he need have no other interest. His appointment by the Probate Court cannot be attacked in these collateral proceedings. Construing the statute with absolute strictness, the complaint is within its terms.

The result is that the decree of the Probate Court is to be affirmed so far as it denies the motion to dismiss, and so far as it requires the respondent to appear in the Probate Court and be examined on oath touching the matters of the complaint; and the case is remanded to the Probate Court for further proceedings. *So ordered.*

JOSEPH McLEAN *vs.* WILLIAM S. COLE.

Suffolk. November 17, 1899. — November 29, 1899.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries occasioned by Falling from a Staging — Negligence.

At the trial of an action for personal injuries occasioned to the plaintiff by falling from a staging, which had just been built of new material under the direction of the defendant, and which was such as was commonly used for the purpose, it appeared that the plaintiff, who was a carpenter of experience, assisted in

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building it and made no objection to its sufficiency, and that while he was upon it and in the act, with a fellow workman, of removing the gutter from the building "the gutter threw him back, and with the swinging and shaking of the staging he let the gutter go, in trying to save himself or to get hold of the building, which he could not do, and fell to the ground." The staging remained standing, and there was evidence that a stay to one of the upright posts was broken, how or when not appearing, and that a piece of split wood from the wood pile was put under one of the posts; but it did not appear that either had anything to do with the accident. *Held*, that the plaintiff could not recover.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration contained three counts, the first at common law and the other two under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Lilley*, J., who, at the close of the plaintiff's case, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

G. A. O. Ernst, for the plaintiff.

G. W. Buck, for the defendant.

MORTON, J. The plaintiff was injured by falling from a staging. It appears that the staging had just been built under the direction of the defendant, and that the material was new and such as was commonly used for the purpose. The plaintiff, who was a carpenter of twelve or thirteen years' experience, and who was to use it, assisted in building it and made no objection to its sufficiency. While the plaintiff was upon it and in the act with one Beal, a fellow workman, of removing the gutter from the building, "the gutter threw him back, and with the swinging and shaking of the staging he let the gutter go, in trying to save himself or to get hold of the building, which he could not do, and fell to the ground." This is the plaintiff's account of the way in which the accident happened. The staging did not fall, but continued to stand. There was evidence that one of the stays to one of the upright posts was broken; one of the posts rested on a piece of split wood on the ground taken from the wood pile, though how or when does not appear. There was also evidence that a piece of split wood from the wood pile was put under one of the posts in the ground. But it does not appear that either this or the broken stay had anything to do with the accident. The accident seems to have been due to the unexpected ease with which the gutter came off in consequence of the force which

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was being applied to it by the plaintiff and Beal, and which caused the plaintiff to lose his balance and fall. Naturally the staging was not as firm as the solid earth, and it was more difficult for the plaintiff to recover his balance than it would have been upon the ground. But we do not think that in building the staging the defendant was bound to anticipate the strain to which it was subjected by reason of the unexpected wrench which occurred in taking off the gutter.

Exceptions overruled.

CHARLES A. BONNEY *vs.* LOTTIE E. BONNEY.

Plymouth. November 28, 1899. — November 29, 1899.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Libel for Divorce — Acts not amounting to Cruel and Abusive Treatment.

At the trial of a libel for divorce for cruel and abusive treatment within the meaning of Pub. Sts. c. 146, § 1, it appeared that the libellee failed to stay at home and take care of her husband or to consent to his hiring a nurse or housekeeper so to do, threatening to leave him if he did hire one, that he was not dependent solely upon his wife, that he was under the care of a physician and had the money with which to procure nursing and proper food, which food he did in fact procure when he got up from his sick bed by boarding with the occupants of another tenement in the same house, and that he afterwards went away in search of health. There was no pretence that the hiring of a nurse could not have been done through the physician. *Held*, that under these circumstances the fact that the libellant's health was temporarily injured by the libellee's failure to comply with the doctor's orders as to the libellant's diet and medicines was not sufficient.

LIBEL, for divorce on the ground of cruel and abusive treatment. Hearing in the Superior Court, before *Bond*, J., who ruled that the conduct of the libellee did not constitute cruel and abusive treatment, and, at the request of the libellant, reported the case for the determination of this court. The facts appear in the opinion.

P. A. Aubertin & R. O. Harris, for the libellant.

No counsel appeared for the libellee.

LORING, J. We are of opinion that the acts of the libellee did not amount to cruel and abusive treatment within the mean-

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ing of Pub. Sts. c. 146, § 1. The libellant testified: "There was nobody else in the family to administer medicines except my wife; she gave me medicines when she was there; she did not remain at home all the time; she went to the theatre and dances; she was at work also. I was of financial ability to procure a servant. I endeavored to procure a nurse or housekeeper to wait upon me. I wanted to; she said if I did she would leave the place." Another witness for the libellant testified that the libellee "was off on her wheel sometimes; she could not do as she could if she stayed at home."

Without doubt the libellee failed to perform the duties of a wife in failing either to stay at home and take care of her husband, or to consent to her husband hiring a nurse or housekeeper so to do. But the libellant was not dependent solely upon his wife. He was under the care of a physician, and had the money with which to procure proper food and nursing. It appears that he did in fact procure the proper food when he got up from his sick bed, by boarding with the occupants of another tenement in the same house, and that he afterwards went to Jamaica in search of health. If he was not content with the care his wife gave him while he was sick in bed his remedy was to hire a nurse, even if his wife wrongly threatened to leave his tenement if he did so. There was no pretence that this could not have been done through the physician in attendance.

Under these circumstances the fact that the libellant's health was temporarily injured by the libellee's failure to comply with the doctor's orders as to the libellant's diet and medicines is not sufficient. Her action in that respect may in one sense be said to be cruel, and the libellant may be said to have been abused by her. But it is not such cruel and abusive treatment as under the circumstances of the libellant will cause injury to his health or create danger of such injury, or reasonable apprehension of such danger, if the parties continue to live together; and nothing less will make out a case of divorce on this ground. *Bailey* v. *Bailey*, 97 Mass. 373, 380, 381. *Lyster* v. *Lyster*, 111 Mass. 327, 328, 329.

Libel dismissed.

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EDWARD F. CARPENTER *vs.* HERBERT C. FISHER.

Worcester. October 2, 1899. — December 1, 1899.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Broker's Commission — Double Employment — Exceptions — Option.

In an action against the buyer of land for a broker's commission, if the plaintiff's evidence leaves it doubtful whether, while acting for the defendant, he also was employed by A., the owner of the land, to sell it, or simply had an option on the property at a price named, the defendant is entitled to have the jury instructed that "if the plaintiff acted as agent for A., without disclosing the fact that he was such agent to the defendant, he cannot recover a commission from the defendant."

The fact that in an offer by B. for property which A. claims made him B.'s broker B. named the price which he was willing to pay the owner of the property and the sum which he was willing to pay A. is immaterial, in an action by A. against B. for a broker's commission.

A question of pleading not raised at the trial is not open on exceptions in this court, although the bill of exceptions states that the pleadings are made a part thereof.

If A. is given by B. merely an option on the latter's land at a price named, A., without violating any duty to B., may elect not to exercise such option and undertake the duties incident to acting as a broker for C. in the purchase of the land, and in that event the existence of the prior option is not a material fact which A. in good faith is bound to disclose to C.

CONTRACT, in two counts, to recover a commission for services in the purchase of certain premises in Worcester. Answer, a general denial. Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, which, after stating that the pleadings were made a part thereof, was in substance as follows.

The plaintiff testified that on Saturday, March 27, 1897, he went to the defendant's office and had a conversation with him; that the defendant spoke of two or three cases in which he had sold real estate and made some money, and the plaintiff said to him, "I think I could get for you the property at 87 Woodland Street so you could make a thousand dollars, and make it quick"; that the plaintiff described it to him, and told him what had been done with it, how it had been handled, and what was probably the value, in his opinion, and the defendant asked,

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"What can I get it for?" to which the plaintiff replied, "$6,500"; that the defendant then said, "That is too much; you are making too much out of it. I will tell you what I will do; if it is just as you represent it, I will give $6,000 for it, and give you $100"; that the plaintiff replied, "That is pretty low, but I am pretty sure of the money, and I will do it"; that the property in question belonged to Asa Ross; that at that time the plaintiff had in his hands the sale of that property for Ross; that the plaintiff and the defendant then went and examined the property thoroughly; that on the following Monday the plaintiff went to see the defendant, and said to him, "What are you going to say this morning?" to which he replied, "Well, I have got to go to Fitchburg"; that the plaintiff then said, "There are two items I did not think of at the time; I would not wonder if I could get Mr. Ross to put in the insurance transfer and some coal that may be in the cellar, and if he does this it is probably worth pretty much what you are going to pay me for it altogether, and it would not cost me a cent to make the deal"; that the defendant said, "If you can do it I will do it"; that the plaintiff immediately saw Ross and communicated everything to him, telling him that the defendant would pay him $400 in money, and give him a second mortgage for $2,300 at five per cent, and take it at $6,000 if he would transfer the insurance policy and the coal; that Ross then said, "You ought not to have said anything about the insurance or coal; I never offered it for less than $6,000; I told you I would give you all over $6,000"; that Ross finally told him that he might "make out the papers"; that he made them out immediately, and the parties signed them and the money was paid; that after the transaction was completed the plaintiff had an interview with the defendant, who said, "I cannot pay you for that commission today, for I paid him all the money I had"; that after some further conversation the defendant told him to call that night and he would pay him; that he called at night and received $5 on account, the defendant promising to pay him more on the following Thursday; that when the plaintiff called on Thursday the defendant said, "I shall not pay you a dollar. If I had gone to Mr. Ross I should have saved $500; I could have got it for $5,500. You have beaten me; you have helped to do

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it to get your commission out of it," or something like that; and that the plaintiff then brought this action.

On cross-examination the plaintiff testified, among other things, as follows: "*Q.* Did you have any conversation with Mr. Ross with relation to this property previous to seeing the defendant? *A.* I certainly did. — *Q.* In regard to selling it? *A.* Yes. — *Q.* Is there any other contract between you and him whereby you were to sell the property? *A.* Yes, a verbal contract that I should have all over $6,000 that I could get. — *Q.* That is from Mr. Ross? *A.* Yes. — *Q.* After that conversation you went to see the defendant with relation to selling it? *A.* I did not go for that purpose when I went in. — *Q.* You asked the defendant to buy it? *A.* I did. — *Q.* What did you say to him then? *A.* I asked him $6,500 for it. — *Q.* What did he say? *A.* He said I was making too much. — *Q.* Was that the first thing that was said? *A.* Yes; he said, 'I think you make $500 out of that.' — *Q.* Up to that time you had not informed him that you could get all that you made over $6,000? *A.* No, sir, but he guessed pretty near. — *Q.* He guessed? *A.* He guessed pretty close; he said that I was making $500."

The defendant denied in his testimony that he promised to pay the plaintiff anything for his services, and testified that the plaintiff was to sell the property, and was to have one half of the net profits of the transaction.

At the conclusion of the evidence the defendant requested the judge, first, to instruct the jury to find for the defendant; and, secondly, to instruct them as follows:

"If the plaintiff acted as agent for Ross, without disclosing the fact that he was such agent to the defendant, he cannot recover a commission from the defendant."

The judge refused to give the instructions requested, and did not give the jury any instructions concerning the double agency or double employment of the plaintiff.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

T. H. Sullivan, for the defendant.

C. Haggerty & J. R. Kane, for the plaintiff.

LORING, J. The second instruction requested should have been given. The defendant had the right to assume in this

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instruction that the plaintiff claimed to have been employed by the defendant as a broker. In both counts of his declaration he made allegations to that effect. He so testified; and his counsel in this court so contended in the brief on which the case was submitted.

It is admitted that a broker has no claim to be paid for his services if he undertakes to act for both vendor and vendee. The reasons for the rule are fully set forth in *Alvord* v. *Cook*, 174 Mass. 120. But it is contended that that principle is not applicable in this case, because, first, the plaintiff had an option from Ross, and was not acting as his agent; second, the defendant fixed the price he was willing to pay, and there was no question open as to it; and, third, the evidence discloses the fact that the defendant knew the plaintiff was acting for Ross.

The plaintiff testified that at the time of his conversation with the defendant he had the sale of the property in his hands for Asa Ross. We think it doubtful whether, taking all the plaintiff's testimony together, that statement is to be taken literally; that is to say, that it is to be taken as a characterization of what he afterwards testified to, that what he afterwards testified to was not an option, but was an employment by Ross of him as a broker; or whether, on the other hand, it was an inaccurate way of referring to what he afterwards testified to without characterizing that transaction, leaving it open for him to contend that all that passed between him and Ross was the giving to him of an option on the property for $6,000. The question which construction was the true one was a question which had to be determined by the jury, and the defendant in this instruction rightly asked to have it so determined.

The fact that in the offer which the plaintiff claimed made him the defendant's broker the defendant named the price which he was willing to pay the owner of the building and the sum he was willing to pay the plaintiff is immaterial. Whatever were the relations of the plaintiff to Ross, or anybody else, up to the time of that conversation, as soon as the plaintiff acceded to the defendant's proposition that the defendant should pay the plaintiff for his services in the purchase of this property, the plaintiff came into a relation of confidence with the defendant such that it was his duty to act in the

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defendant's interest in the transaction in every reasonable way; after that the defendant had a right to believe that if the plaintiff then knew, or in the course of the proceedings discovered, any facts which he, the defendant, contemplating a purchase, ought to know, the plaintiff would disclose them, whether these facts related to the views or desires of the seller, to the price at which he would consent to sell if he could not get more, to the condition, qualities, or value of the property as bearing upon the price which the purchaser could reasonably afford to pay for it, or to anything else in the interest of the proposing purchaser. For example, if the plaintiff had known, or had reason to think, that the property could be bought for less than the sum named by the defendant as the sum he was willing to pay, it became his duty, upon accepting the defendant's promise to pay him for his services in the transaction, to disclose that to the defendant. The fact that the principal names a sum as the sum he is willing to pay is in no sense final. One of the benefits which such a principal is entitled to receive from the broker whose services he secures by his promise to pay for them is information and aid enabling him to get the property for less than he is, without that information and aid, willing to pay. And in this case the defendant finally paid less than the sum originally named by him through the plaintiff's services in getting Ross to throw in the coal and insurance.

It is barely possible that what passed between the plaintiff and defendant might have been interpreted to be a promise to pay $100 for something other than a commission for the plaintiff's services as a broker in purchasing the land in question. But that question does not arise in this action. This was an action to recover from the defendant a commission for services rendered by the plaintiff to the defendant in the purchase of the land in question. The plaintiff testified that he was employed as a broker, and his counsel so contended in the Superior Court and before this court. By the very form of the action the plaintiff contended that he acted as a broker for the defendant; and, so long as he prosecutes this action and not another action, the plaintiff must make good his right to be paid as a broker, and the defendant makes out a defence if he shows that the plaintiff has not rendered to him the duties owed by a broker to his principal.

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The evidence cannot be said to disclose the fact that the defendant knew that the plaintiff was acting for Ross. On cross-examination the plaintiff testified that in the conversation between the plaintiff and the defendant the defendant said, "I think you make $500 out of that"; that up to that time he had not informed the defendant that he could get all that he made over $6,000, but that the defendant "guessed pretty near," that "he guessed pretty close; he said I was making $500." This was all the evidence on that point.

The plaintiff's contention that if he acted for both purchaser and seller that fact should have been set up in the answer is correct; but that point does not appear to have been taken at the trial, and is not before us in this bill of exceptions. *Bass* v. *Edwards*, 126 Mass. 445.

The presiding justice was right in refusing to instruct the jury to find for the defendant. On the evidence the jury could have found that the plaintiff never became a broker for Ross, but that all that passed between them was the giving to the plaintiff of an oral option on the land at $6,000. If Ross merely gave the plaintiff an option on the land at $6,000, the plaintiff owed him no duty by reason thereof, and he could, without violating any duty to Ross, elect not to exercise that option and undertake the duties incident to acting as a broker for the defendant. The previous existence of this option which the plaintiff in the case supposed had elected not to exercise was not in any way inconsistent with his being a broker for the defendant; by his election not to exercise the option any possible interest on the part of the plaintiff in the land ceased, and the existence of the prior option was not a material fact which the plaintiff in good faith was bound to disclose to his principal. The option having been given by word of mouth was not binding on Ross; but had the existence of the option been material this would have made no difference; the existence of such an arrangement, even if not binding, would have incapacitated one from accepting duties inconsistent with his interests under the arrangement.

New trial ordered.

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DALTON-INGERSOLL COMPANY *vs.* ANDREW J. FISKE & others.

Middlesex. January 11, 1899. — December 2, 1899.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Appeal — Superior Court — Judgment — Police Court — Entry of Default and Judgment during Pendency of Motion — "Ripe for Judgment."

It is within the power of the Superior Court, in a case appealed from a police court, the appeal having been dismissed and afterwards the case having been continued for judgment to await proceedings on mandamus, to allow, after the session has adjourned without day and before the first Monday of the following month, when by the 27th rule of that court judgment may be entered in all actions ripe for judgment under a general order of the court, motions to vacate an order dismissing the appeal, to file an amended record showing that the appeal had been seasonably made, and to grant a new trial.

In an action begun in a police court by trustee process, the plaintiff, by taking judgment against the defendant alone, discontinues as against the trustee and waives all right to pursue him further, and, the trustee being thereby discharged, the fact that he was afterwards defaulted for not appearing is an error of the clerk which cannot affect the validity of the judgment rendered against the defendant.

If the plaintiff in an action pending in a police court puts it on the trial list and gives the required notice to the defendant, who fails to appear, the latter may be defaulted and judgment may be entered against him, although a motion for continuance to await the result of insolvency proceedings is pending.

CONTRACT upon a bond to dissolve an attachment executed by the first named defendant as principal, and by David F. Inglis and James J. Mehan as sureties. Trial in the Superior Court without a jury, before *Richardson*, J., who found for the plaintiff; and Mehan, who alone defended, alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in January, 1899, and afterwards was submitted on briefs to all the justices.

G. L. Mayberry, for Mehan.

C. T. Cottrell, for the plaintiff.

LATHROP, J. This is an action against the principal and sureties upon a bond to dissolve an attachment, brought originally in the police court of Newton, and taken on appeal by

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the plaintiff to the Superior Court. It is now before us, after a finding for the plaintiff, on the exceptions taken by one Mehan, a surety on the bond, who alone defended the case in the Superior Court.

The first question before us is whether the case was properly before the Superior Court. It appears from the record of the police court that a finding for the defendant was made on April 28, 1894, and the "time of appeal extended seven days.' The case was duly entered in the Superior Court. On February 5, 1897, the defendant Mehan moved that the appeal be dismissed for want of jurisdiction, for the reason that it did not appear by the record that the appeal was seasonably taken within twenty-four hours after the judgment of the police court. St. 1893, c. 396, §§ 24, 25. Under these sections the lower court may extend the time for filing the appeal bond, but not the time for taking the appeal. The plaintiff on February 10, 1897, filed a motion that the record be sent back to the police court to be amended, alleging that the facts were that the appeal was duly taken within the time prescribed by law, and the time for filing the bond or perfecting the appeal was extended seven days, for cause shown, and $100 was deposited in lieu of bond within seven days. On February 17, 1897, the court overruled the motion of the plaintiff and allowed the motion to dismiss the appeal, and directed the clerk to make an entry on the docket of "Appeal dismissed," which entry was accordingly made. On February 27, 1897, the following entry was made on the docket, "Continued for judgment to await proceedings on mandamus petition." Between February 17 and February 27 the session of the court had adjourned without day. After the adjournment the plaintiff filed three motions: the first, to vacate the order dismissing the appeal; the second, to file the amended record; the third, to grant a new trial. These motions were allowed. The amended record showed that the appeal had been seasonably made.

In the following September, when the case was reached in its order, the defendant asked the court to rule that all motions and orders in the case which purported to be made after the entry of February 17, 1897, could not have the effect of vacating or setting aside the judgment dismissing the appeal for want of juris-

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diction which was entered on that day. The court refused so to rule; and the defendant excepted.

We are of opinion that the fact that the court had adjourned without day is of no consequence. Since the St. of 1885, c. 384, § 2, both the Supreme Judicial Court and the Superior Court are always open, and terms no longer exist. See *Dudley* v. *Keith*, 153 Mass. 104, 107; *James* v. *Southern Lumber Co.* 153 Mass. 361; *Bailey* v. *Edmundson*, 168 Mass. 297; *Tim* v. *Rosenfeld*, 168 Mass. 393. The 27th rule of the Superior Court provides: "On the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court; and the court or any justice, may at other times order judgment to be entered in any action." An order dismissing an appeal is not a judgment, and until the first Monday of the following month had expired it was clearly within the power of the court to continue the case. *Pierce* v. *Lamper*, 141 Mass. 20. The case being before the court when the three motions were made, the court had the power to hear and decide them. The defendant's first exception must, therefore, be overruled.

The remaining exceptions relate to the question whether the judgment was regularly and properly entered in the original action in which the bond was given.

It appeared that the original action was begun by a trustee process; and the bond in suit was given to dissolve the attachment, under the Pub. Sts. c. 161, §§ 122 *et seq.* While the bond was signed by the principal and his sureties and properly described the action, it did not contain the name of the principal in the condition, but read as follows: "Now, therefore, if the above bounden David J. Ingalls and James J. Mehan shall pay to the plaintiff in said action the amount, if any, that he may recover therein, within thirty days after the final judgment in said action," etc. The defendant contends that the bond being valid only as a common law bond did not dissolve the attachment, and that further action should have been had against the trustee. But the plaintiff, by taking judgment against the defendant alone, discontinued as against the trustee, and waived all right to pursue him further. *Jarvis* v. *Mitchell*, 99 Mass. 530. See also *Davis* v. *Ferguson*, 148 Mass. 603. The trustee was thereby discharged, and the fact that he was afterwards defaulted

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for not appearing was clearly an error of the clerk, which cannot affect the validity of the judgment recovered against the defendant in that action.

It further appeared that in the original action the defendant Fiske, on November 15, 1893, filed a suggestion of insolvency, with a motion for a continuance to await the result of the insolvency proceedings. The plaintiff put the case upon the trial list of civil cases for November 29, 1893, and gave the defendant the required notice thereof. On the day last mentioned, the defendant failed to appear and was defaulted. Damages were assessed by the court, and on December 1, 1893, the clerk, under the general rule of that court, entered judgment for the plaintiff for a certain sum, being the damages assessed and costs, and four days later issued execution, which has not been satisfied. The defendant asked the judge in the present action to rule that the alleged judgment was irregular and invalid because no valid judgment could be entered until the defendant's motion for continuance to await the result of the insolvency proceedings was passed upon or in some way disposed of. The judge refused so to rule; and the defendant excepted.

It is obvious that the attack is really upon the default ordered by the judge, and not upon the judgment, except so far as this is incidentally involved in the regularity of the default. The police court of Newton was established by the St. of 1876, c. 195, and is one of the courts mentioned in the Pub. Sts. c. 154, § 1. By § 11, "police and district courts may in their respective counties exercise the same powers, shall have the same jurisdiction civil and criminal, and shall perform the same duties and be subject to the same liabilities as trial justices." Section 12 provides: "They shall have and exercise the powers necessary and proper for the discharge of their duties; and the proceedings in the hearing, trial, and determination of cases, and all matters relating thereto, shall be substantially the same as in like cases before trial justices, unless otherwise expressly provided."

The Pub. Sts. c. 155, relates to trial justices, and it is provided, by § 22, "If a person duly served with process fails to appear and answer thereto, his default shall be recorded and the charge against him in the declaration taken to be true. Upon such default, or when the plaintiff maintains his action upon a trial, the

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trial justice shall award and enter judgment for such sum, not exceeding the amount of his jurisdiction in the case, as he upon inquiry finds the plaintiff is entitled to recover with costs." The laws relating to district and police courts were revised and consolidated by the St. of 1893, c. 396, which was in force when the default was entered in this case. Section 19 contains the same language in regard to defaults as that above cited. This form of language applies to a case where a defendant has once appeared as well as to a case where he never appears. *Jarvis* v. *Blanchard*, 6 Mass. 4. See also *Willey* v. *Durgin*, 118 Mass. 64, 69, in which case it is said by Chief Justice Gray: "It is within the discretion of every court, as incident to the arrangement and regulation of its business, at such times as it may appoint, to call the docket of actions which have been entered and have not reached final judgment; and to default any party who fails to appear when called, even if an appearance has been previously entered in his behalf. *Jarvis* v. *Blanchard*, 6 Mass. 4. *Randolph* v. *Barrett*, 16 Pet. 138."

There certainly can be no doubt that it is within the power of a police court to order a default, where, as in this case, the case was set down for a hearing, and notice given to the defendant, who did not appear.

The defendant in the case before us contends that a judgment could not be entered because there was a suggestion of insolvency and a motion for a continuance pending. But, as we have already said, the real question in the case is whether the court had the power to enter the default on the non-appearance of the defendant in the original action. There is nothing peculiarly sacred in a suggestion of bankruptcy or insolvency, and a motion for a continuance. It is generally the last resort of a debtor to avoid payment of his debt, when he has no defence. Such a motion is addressed entirely to the discretion of the court, and no exception lies to the exercise of such discretion. *Barker* v. *Haskell*, 9 Cush. 218. *Reed* v. *Paul*, 131 Mass. 129, 132. *Sullings* v. *Ginn*, 131 Mass. 479.

The defendant relies upon certain language in the case of *Hosmer* v. *Hoitt*, 161 Mass. 173. We have no doubt that that case was rightly decided; but we are of opinion that the reason given for the decision was wrong. The case came before the

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court on a motion to take off a default, no judgment having been entered. The case was a very simple one. By the St. of 1885, c. 384, § 10, the Superior Court had the power at any time before judgment to strike off the default. This power the Superior Court exercised; and this court overruled the plaintiff's exceptions. It was unnecessary for the decision to treat the case as if a judgment had been entered, and to say that the case was not ripe for judgment because a suggestion of insolvency and a motion for a continuance had not been acted upon before the case was defaulted.

In *Norcross* v. *Crabtree*, 161 Mass. 55, it was said that the clerk could not enter a judgment under the 27th rule of the Superior Court pending an appeal, because the case was not ripe for judgment. But in this case, also, no judgment had been entered. See *Bailey* v. *Edmundson*, 168 Mass. 297. There can be no doubt that *Norcross* v. *Crabtree* was rightly decided, under the 27th rule of the Superior Court, for here something had intervened between the default and the time when judgment would have been entered, had the clerk entered it, namely, the motion to take off the default and the appeal from the order of the court disallowing the motion. Under such circumstances it may well be said that a case is not ripe for judgment. But where nothing intervenes between the default and the judgment, it seems to us impossible to hold that the case is not ripe for judgment, because prior to the default a motion was made to continue the case. It is no part of the duty of a judge, nor is it the practice, when a defendant does not appear, to wait until all the papers in the case have been fully examined, before entering a default. By submitting to a default the defendant waives all defences and all motions.

A person defaulted has no standing in court except to move to take off the default. The 48th rule of the Superior Court provides: "When a default is entered in an action it shall not be stricken off after the day upon which it is entered, except upon notice to the adverse party and upon an affidavit of merits in the defence, with a statement of its nature, and proof to the satisfaction of the court that a defence in good faith is intended."

If a case is in the Superior Court, and a person defaulted takes

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no further steps to take off the default, and does not comply with the above rule, it is difficult to understand upon what ground he has any cause of complaint if judgment is entered against him on the default, or why judgment should be reversed on writ of error.

In *Somerville* v. *Fiske*, 137 Mass. 91, the petitioners, who sought to have a betterment assessment revised, before trial in the Superior Court, applied for leave to make an amendment, and it was allowed, the question of terms being reserved for the further consideration of the court. The jury abated the assessment, and this, by the terms of the St. of 1871, c. 382, § 8, entitled the petitioners to their costs. On the last day of the term the court passed the general order that judgment be entered in all cases ripe for judgment, and that all matters pending, and not passed upon, be continued to the next term of the court. This, as appears from the papers in the case, was on May 17, 1880. Judgment was therefore entered for the petitioners for their costs. A writ of error was thereupon brought, on the ground that the case was not ripe for judgment, because the matter of terms had been reserved by the court and had not been passed upon; but the court said: "It was the duty of the respondent, if it intended to insist upon its claim for terms, to bring the question to the attention of the court during the term; and if it did not do so the court had the right to treat the claim as waived, and to order judgment for the petitioners." It was further said that a special order for costs would have been a disposition of the question of terms; and that the general order had the same effect as a special order, unless the court ordered a continuance, or made some other order which would take the case out of the operation of the general order; and that if the respondent contended that the entry of judgment was a misprision of the clerk, its proper remedy was an application to the Superior Court to correct its records. The opinion closes with the following language: "If it has lost any rights, it is by its own laches in not diligently prosecuting its claim for terms for the amendment." See also *Pierce* v. *Lamper*, 141 Mass. 20; *Cutter* v. *Evans*, 115 Mass. 27.

In *Dunbar* v. *Baker*, 104 Mass. 211, the defendant was defaulted, and an order was made that judgment be entered at the

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end of the term, for the plaintiffs. Before the end of the term, the defendant filed a paper suggesting his bankruptcy and moving that the case be continued. The clerk did not enter judgment under the special or the general order, and at the beginning of the next term the plaintiffs filed a motion that the clerk complete his records by entering judgment as of the last day of the preceding term. No motion was made to take off the default. The Superior Court granted the plaintiffs' motion, and on appeal to this court the judgment for the plaintiffs was affirmed. Mr. Justice Morton, in delivering the opinion of the court, said: "The paper filed by the defendant in the clerk's office, not brought to the notice of the court and not acted on, could not operate to vacate the order of judgment, or to affect the duty of the clerk to enter the judgment of record. . . . If the defendant has lost any rights, it is by his own laches in not properly presenting his motion for a continuance, and obtaining an adjudication thereon before judgment."

It does not appear in the case before us what the general rule of the police court of Newton was, and it is to be noticed that the words "ripe for judgment" do not appear in the statutes relating to police courts until the St. of 1897, c. 431. At common law, judgment followed a default as a matter of course. *Coolidge* v. *Cary*, 14 Mass. 115. When we had terms the practice was to enter judgment, either on some day in the term upon motion, or, of course, on the last day. Howe, Pract. 267. Since terms have been abolished, the practice is regulated by statutes and the rules of the courts. In the case at bar, in the absence of any rule, the St. of 1893, c. 396, § 19, governs; and this allows a judgment upon a default. If, however, the words "ripe for judgment" are to be understood as in the general rule, we have no doubt that a case is "ripe for judgment" when the defendant is defaulted and the damages have been assessed, although there are motions on the files of the court which are undisposed of.

Exceptions overruled.

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MARY C. HUDSON, administratrix, *vs.* PEOPLE'S STREET RAILWAY COMPANY.

Essex. November 8, 1899. — December 5, 1899.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Death — Conscious Suffering — Absence of Due Care by Motorman in operating Street Railway Car.

If, in an action against a street railway company for causing the death and for the conscious suffering of the plaintiff's intestate, who was a motorman, the most natural inference from the facts and the evidence is that he was running his car in the daytime at a high rate of speed until the other car, which he had reason to expect the coming of on the same track, was close upon him, and there is nothing tending to show that, immediately before he tried to stop his car, he was exercising any care in reference to the known risk of a collision, he was not in the exercise of due care, and a verdict was rightly directed for the defendant.

TORT, for causing the death, and for the conscious suffering of the plaintiff's intestate, who was a motorman in the employ of the defendant. The declaration was under the employers' liability act, St. 1887, c. 270, and at common law. Trial in the Superior Court before *Bell*, J., who ruled that the plaintiff's intestate was not in the exercise of due care, and directed a verdict for the defendant; and the plaintiff alleged exceptions. If the ruling was right, judgment was to be entered for the defendant; if wrong, the verdict was to be set aside and a new trial granted. The facts appear in the opinion.

W. H. Moody, (*N. N. Jones* with him,) for the plaintiff.

J. P. Sweeney, for the defendant.

KNOWLTON, J. It is unnecessary to consider whether there was evidence of negligence on the part of any one exercising superintendence for the defendant, as we are of opinion that the presiding justice rightly ruled that there was no evidence of due care on the part of the plaintiff's intestate, while he had reason to expect the coming of another car on the same track. He was a motorman of experience, and was entirely familiar with the road, the manner in which the railway was equipped, and the method of its operation. If we interpret the evidence most favorably to him, he was directed to run a car back towards

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Newburyport to meet the other car of the line somewhere beyond the regular place of meeting. He knew that the car which he was to meet was late and would be likely to be running rapidly. He had no reason to suppose that the conductor or motorman of this car would be expecting to meet his car elsewhere than at the regular meeting place near the middle of the line; he knew that there was no telephonic communication from Haverhill, whence his orders came, to points along the line or to the terminus at Newburyport, although there was a telephonic line to the office of another street railway company in Newburyport about six hundred or a thousand feet from the terminus of the defendant's railway. He had no reason to suppose that any orders had been given to the conductor or motorman of the other car to run their car differently from usual, or to stop before reaching the usual place. He knew that the set-back car had been sent back to meet his car without any reason on his part to expect its coming, and the natural inference would be that his car was to go back to meet the other car of the regular line while the motorman of that car supposed that his car was running over the whole line as usual. The view most favorable to the plaintiff's intestate is that he thought it possible that the superintendent had telephoned to the office of the other company in Newburyport, and had caused an order to be given to the conductor or motorman of the other car to stop at number three turnout, which is next easterly of the regular turnout at the middle of the line. He certainly had no assurance or information of this, and it would seem that he had little, if any, reason to think that such an order had been given. Indeed, there was uncontradicted evidence that on two previous occasions he had gone forward, apparently without orders, beyond the middle turnout on the road to Haverhill, and had met the other car not far from the place where this accident happened. Under these circumstances it was the duty of the plaintiff's intestate after he passed the middle turnout, as it had previously been the duty of the motorman of the set-back car, to run his car very carefully, and, except in places where the road was visible for a long distance before him, very slowly. It was in the daytime, and doubtless in many places he could see along the road far enough to enable him to run the car safely at its usual speed; but in

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those places where his view was obstructed he should have proceeded cautiously, watching constantly to see if the other car was approaching. The failure to do this would be negligence which would prevent a recovery in this action.

The burden of proof was on the plaintiff to show that her intestate was using due care, and she introduced no evidence to sustain this burden. All that appears in the bill of exceptions which refers to his conduct after passing the usual meeting place is contained in the sentence, "A head-on collision of considerable force ensued, although the motormen of both cars endeavored to check their speed." How near together the cars were before the motormen tried to check their speed does not appear. There is nothing to show that the plaintiff's intestate was not running his car rapidly, or that he was taking any precautions in reference to the probability or possibility of meeting the other car. It does appear that he was going down a steep hill, and that a light snow had begun to fall, making the rails slippery. These facts increased the importance of using special care. The most natural inference from the facts and evidence stated in the bill of exceptions is that he was running his car at a high rate of speed until the other car was close upon him. There is not a word in the bill of exceptions which tends to show that, immediately before he tried to stop his car, he was exercising any care in reference to the known risk of a collision.

Exceptions overruled.

LOUISE SEARS *vs.* S. R. MERRICK & another, executors.
ANDREW T. SEARS *vs.* SAME.

Worcester. October 3, 1899. — December 6, 1899.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Personal Injuries — Unsafe Condition of Premises fitted for Use of Public — Liability of Owner — Action.

The front line of a building situated at the corner of A. Street and B. Street, which ran at right angles to each other, in the business section of a town, was set back from each street line. The whole space from the face of the building to the curbing of the sidewalk on each street was covered with concrete and presented

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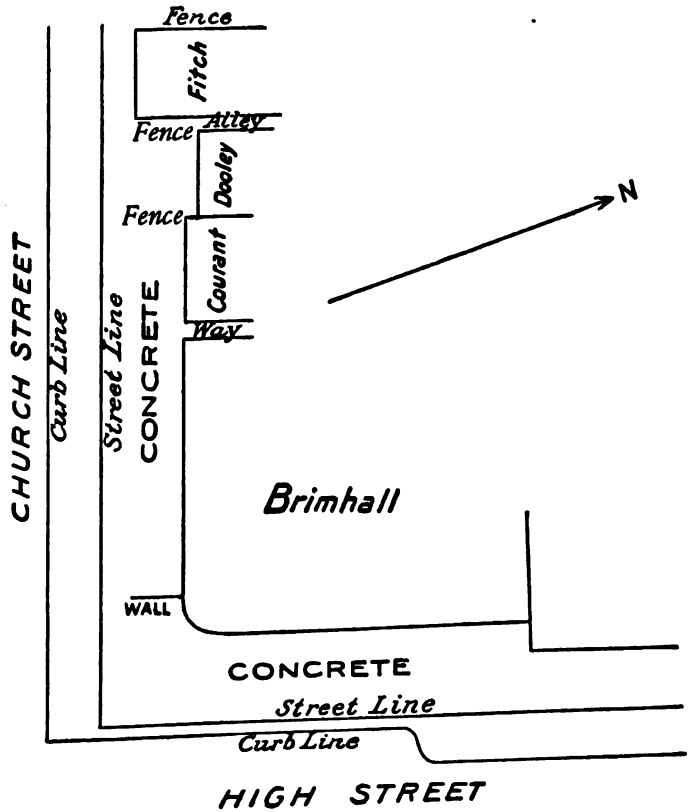
a uniform appearance, there being nothing to distinguish the part maintained by the town from the part owned and maintained by the owner of the building, and both parts were used openly and freely for public travel. The only exception to the uniformity of appearance was that on B. Street, a short distance from the corner of the building, there being a difference in grade in the concreted area, which terminated abruptly, a retaining wall separating the two grades was built two feet high where it began on the face of the building and ran about seven feet until it met the grade of the sidewalk, where it ended, and it had no fence or guard. A woman, who, on a dark night, had been transacting business at a store in a building owned and controlled by the defendant, the entrance to which was on A. Street, and who was unfamiliar with the premises, after leaving the building, proceeded along the concreted area on A. Street to the corner, and then round the corner on the concreted area on B. Street, stepped over the wall at a point about six feet from the building and within the part maintained by the owner, and fell, receiving injuries. *Held*, that she could maintain an action against the owner of the building for her injury.

TWO ACTIONS OF TORT, the first being for personal injuries sustained by the plaintiff upon premises of the defendants' intestate in Clinton, which are shown on the plan printed below;



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and the second being for loss of the society and services of the plaintiff's wife, and for expenses incurred by him, owing to the injury sued for in the first case. The cases were tried together in the Superior Court, before *Braley*, J., who ruled that the plaintiffs were not entitled to recover; directed the jury to return a verdict for the defendant in each case; and, at the request of the plaintiffs, reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the verdicts; otherwise, judgment was to be entered for the plaintiff in each case, and the cases were to stand for the assessment of damages. The facts appear in the opinion.

J. W. Corcoran, for the plaintiffs.

W. A. Gile & J. Smith, for the defendants.

LORING, J. The defendants' testatrix owned a building, called the Brimhall block, situated on the corner of High and Church Streets, in the town of Clinton; these streets run at right angles to each other, High Street running north and south, and Church Street east and west. The front line of the building on each street was set back from the street line; the whole space from the face of the building to the curbing of the sidewalk was covered with concrete, and presented a uniform appearance, except for the bank or retaining wall just round the corner on Church Street, hereinafter described. On High Street the building was set back fifteen and thirty-four one-hundredths feet, the whole sidewalk being but one foot wider. On Church Street it was set back at the easterly end eleven and seventy-one one-hundredths feet, and at the westerly end ten and twenty-seven one-hundredths feet, the sidewalk outside of the defendants' concreted area being seven and ninety-one one-hundredths feet in width; that is to say, on High Street the whole sidewalk, including the defendants' concreted area and that within the side line of the street, was in round figures sixteen and one half feet wide, of which the defendants' concreted area was fifteen and one half feet, and the town's area was one foot; and on Church Street the whole sidewalk was twenty feet in width, of which the defendants' area was twelve feet, and the town's eight feet.

It is expressly found in the report that at the time of the accident the premises where the accident occurred were owned

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and controlled by the defendants' testatrix; that the area in front of her building on High Street, fifteen and one half feet wide, was "wrought and prepared," and that in front of her building on Church Street, twelve feet wide, was "prepared and maintained," by her; that the sidewalks on both streets, throughout their entire width, were covered with concrete, and presented a uniform appearance, there being nothing to distinguish the part maintained by the town from the part prepared by the defendants' testatrix, and both parts were used openly and freely for public travel.

The corner of the defendants' building at the junction of the two streets was rounded so as to admit of a window being placed in the round corner wall so made. There is a sharp descent in the grade of the High Street sidewalk, beginning at a point on the face of the defendants' building on High Street, a few feet north of the beginning of the rounded corner, and running thence across the concreted area to the southerly curb-stone of the sidewalk of Church Street. Church Street also descends rapidly going west from High Street. The grade of the concreted area next the face of the building on Church Street is lower than the concreted area at the corner of the street; this difference in grade terminates abruptly at the point on Church Street where the curve of the round corner of the building begins. At that point the defendants' concreted area on Church Street is two feet lower than the defendants' concreted area on the round corner of the building; the two are separated by a bank or retaining wall, which is two feet high where it begins on the face of Brimhall block, and which runs southerly toward the south curb of the Church Street sidewalk a distance of six and ninety one-hundredths feet, where it meets the grade of the sidewalk and ends. There was no fence or guard of any kind on this retaining wall.

About eight o'clock in the evening on February 2, 1897, the plaintiff in the first case, with her husband, who was the plaintiff in the second case, came to Clinton for the first time. They went to the store of Lucius Field and Company, in Brimhall block, on business; the door of this store is on High Street, about forty-seven feet north from the corner of Church Street. On leaving this store they proceeded to walk to a building on

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Church Street, known as the Dooley building, about one hundred and forty-five feet west from the corner of High Street. The night was dark. The plaintiff in the first case was walking beside her husband, who was on the street side of her and about ten inches distant. When she came to the retaining wall she stepped over it and fell, and was injured thereby; and it is for that injury that these two actions are brought. The point where she stepped over the retaining wall was about a foot from its outer end; that is to say, about six feet from the face of the building of the defendants' testatrix on Church Street. No question was raised as to the exercise of due care on the part of the plaintiffs.

The defendants contend that the whole situation, the retaining wall, the fence at the west line of the premises of the defendants' testatrix, and the buildings below coming out to the line of the sidewalk, showed that the open area was not a part of the public street, and effectually negative any implied invitation by the defendants' testatrix to pass over her land, and that on that ground the ruling of the presiding justice was right.

It appears from the plans and photographs made part of the bill of exceptions that Brimhall block extends on Church Street about one hundred and five feet; then comes a thirteen foot way between Brimhall block and another building of the defendants' testatrix, called the Courant building, twenty-five feet wide; beyond this building is a building known as the Dooley building, beyond that is an alley way, and beyond the alley way is a wooden building known as the Fitch building. The Courant building is set back on the same line as that of the Brimhall block, and the Dooley building is set back a little farther still.

The whole sidewalk, twenty feet wide, in front of the two buildings of the defendants' testatrix, from High Street to the westerly line of the Courant building, that is, to the easterly line of the Dooley building, including the part which is within the street line and that within the line of private ownership, is concreted and uniform in appearance. The grade of the private concreted area in front of the Dooley building is lower than that of the eight foot sidewalk in front of it, which again

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is the same as the grade of the concreted area in front of the Courant building. The two concreted areas are divided by a bank wall, on which is an iron fence made of two iron pipes supported by two iron standards, the outer standard being placed at a point a little nearer the Dooley building than the inner side line of the town sidewalk eight feet wide; at that point the grade of the top line of the bank wall meets the grade of the sidewalk, and the bank wall ends. Just east of this standard is a column supporting a sign, on which is painted, "Courant Office. Job Printing." Beyond the Dooley building, and between that and the Fitch building, is a cross street or alley way running from Church Street past the Dooley building on a steep down grade; the easterly side of this alley way is supported by a bank wall which runs out into the public sidewalk before it reaches the grade of the sidewalk, and is protected by an iron fence similar to the one on the bank wall on the easterly line of the concreted area in front of the Dooley building; the standard at the outer end of that fence nearest the street being on the northerly or inner side line of the town sidewalk. The Fitch building is nearly out to the northerly line of the town sidewalk, and is set back therefrom some two or three feet, and has a concreted sidewalk covering the whole area in front of it. Beyond and west of the Fitch building there are fences on the line of the town sidewalk, evidently inclosing gardens, the houses being set back, and being hidden by the Fitch building from the view of one standing at the corner of Church and High Streets, from which point the photographs put in evidence were taken.

On the night of the accident the plaintiffs had been to the store of Lucius Field and Company on business. The only access to or from that store was over the defendants' High Street area fifteen and one half feet wide. It is clear, therefore, that the plaintiffs, on leaving Field and Company's store and walking over the concreted area of the defendants' testatrix fifteen and one half feet wide, for the distance of forty-seven feet to the end of Brimhall block on the corner of High and Church Streets, were doing so under an invitation from the defendants' testatrix, and that she owed them the duty of using due care to keep that area, which was the only access to that store, in a safe condition,

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on the well settled principle that the owner of real estate who fits it up for business owes to those coming there on business the duty of using due care to keep the access thereto in a safe condition. *Carleton* v. *Franconia Iron & Steel Co.* 99 Mass. 216. *Curtis* v. *Kiley*, 153 Mass. 123. It is also clear that the invitation and duty did not cease when the plaintiffs reached the end of the block at the corner. The plaintiffs could not reach that part of the concreted surface of the Church Street sidewalk within the side line of that street without crossing the intervening twelve feet of concrete on the land of the defendants' testatrix. No matter whether they continued in a straight line parallel with the side lines of High Street or in the more natural way by following substantially the lines of the rounded corner of the defendants' building, they had to continue on the defendants' concreted area for twelve feet or more beyond the corner before they could reach the eight feet of concrete sidewalk within the side line of Church Street. And further, it is clear that the invitation did not stop at the corner; the same concrete sidewalk, uniform throughout its entire width, without regard to its being on the land of the defendants' testatrix or within the side line of the street, continued around the corner and down Church Street. The only apparent difference was that the whole sidewalk was some three feet wider than that on High Street. As matter of fact eight feet of the twenty foot sidewalk on Church Street was within the limits of the street in place of one foot of the sixteen and one half foot sidewalk on High Street; but there was nothing whatever in the appearance of the Church Street sidewalk to tell the plaintiff that fact. The retaining wall, if she had seen it, did not tell her that fact; that ended six and ninety one-hundredths feet from the face of the building, leaving just short of five feet between that and the inner or northerly line of Church Street. There is nothing, then, at the easterly end of the defendants' area on Church Street which divides that area twelve feet wide from the town area eight feet wide; and for that reason the aspect of the place at the corner does not confine a person to the town's eight feet of the twenty foot concrete sidewalk, uniform in appearance throughout its entire width of twenty feet, as explained above.

The report does not state whether at the time of the accident

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the general aspect of the *locus* extending one hundred and forty-five feet from the corner was actually visible to one standing on the corner of High and Church Streets; the report does state that the night was dark, and the plaintiff in the first suit testified that it was very dark; the Fitch building, which practically marked the final contraction of the concreted area to the eight foot town sidewalk, was one hundred and eighty feet distant; the iron fence on the retaining wall separating the grade of the defendants' concreted area from that in front of the Dooley building was one hundred and forty-five feet distant.

But, giving to the defendants' testatrix the benefit of all that the general aspect of the whole *locus* would give her, there was nothing which told one in the situation of the plaintiff at the corner of High and Church Streets that the invitation under which she had been travelling up to that point had ended and that she was not invited to continue on the same concreted area which she had traversed by invitation since she left Field and Company's store, and which continued around the corner down Church Street, uniform in appearance except for the retaining wall, to the end of the premises of the defendants' testatrix, one hundred and forty-five feet distant. The message given by the partial contraction of the concreted area at the Fitch building one hundred and eighty feet away, thirty-five feet beyond the westerly end of the area in question, and the final contraction of it to the town sidewalk of eight feet in front of fenced gardens still farther west, would more naturally be interpreted by a man of ordinary intelligence and prudence (see *Chenery* v. *Fitchburg Railroad*, 160 Mass. 211) to be that at that point the necessity ceased for the wide sidewalk, which was rendered necessary by the more important commercial character of the buildings in the immediate vicinity of the corner where the two principal thoroughfares of the town met.

Not only is it the fact that on a fair consideration of the general aspect of the *locus* this is the message told to a man of ordinary prudence and intelligence, but the arrangement by the defendants' testatrix of the sidewalk on High Street shows that it is what she intended should be understood. For one hundred and thirty feet from the corner of Church Street the buildings on High Street, including Brimhall block, are set back fifteen and

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one half feet. For the first ninety of this one hundred and thirty feet the sidewalk is sixteen and one half feet wide, one foot only being within the side line of the street. For the next forty feet the sidewalk is seven feet wider, that is to say, twenty-three and one half feet wide; it is evident that for the first ninety feet the seven feet of the eight foot town sidewalk had been thrown into the street between the curbstones, to make that part of the street wider because the character of the stores at that point demanded it. Beyond the one hundred and thirty feet the buildings are set back six feet only, in place of fifteen and one half, and the sidewalk is fourteen feet wide, eight feet being within the side line of the street.

It is evident what the defendants' testatrix intended when she, acting in concert with her neighbors, placed Brimhall block fifteen and one half feet back from the street line and made it possible, first, to have a sixteen and one half foot sidewalk in front of her store, uniform in appearance, and, second, to throw into the street between the curbstones seven feet of the eight foot town sidewalk which reached to that point; it is evident that she intended her concreted area of fifteen and one half feet to be used as the public sidewalk, one foot only being within the side line of the street; and the fact that for the first ninety feet the sidewalk is but sixteen and one half feet wide and for the next forty feet is twenty-three and one half feet wide, and that beyond the buildings are not set back so far and the concreted area is narrowed to fourteen feet, does not negative this intention, but says that the occasion for the wider sidewalk, partly private and partly public, ceased at that point.

There is nothing in the defendants' suggestion that the plaintiff was cutting corners, if that were material. The plaintiff fell over the retaining wall at a point six feet out from the corner; the exact width of the sidewalk was nineteen and one half feet; she was walking about ten inches nearer the building than her husband. He therefore was well within the middle third of the sidewalk. The plaintiff was where she was invited to be.

The defendants' testatrix having invited the plaintiffs to use the concreted area as a sidewalk, was bound to use due care to keep it in a safe condition; allowing this retaining wall to remain unfenced was, or at any rate might have been found to be,

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a breach of that duty; the ruling excepted to was wrong; and by the terms of the report judgment is to be entered for the plaintiff in each case, and the cases are to stand for the assessment of damages. *So ordered.*

CHARLES F. DAHLBORG *vs.* MAURICE WYZANSKI.
JOHN A. JOHNSON & others *vs.* SAME.
DAVID SAMPLE *vs.* SAME.
CARL H. FORSBERG & another *vs.* SAME.

Plymouth. October 17, 1899. — December 6, 1899.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Mechanic's Lien — Consideration of Cases together — Order of Sale — Pendency of Exceptions — Distribution of Proceeds — Costs.

Where the parties to several petitions to enforce mechanics' liens, under Pub. Sts. c. 191, are the same, although no order of consolidation is made, it is within the power of the Superior Court, upon appeal from a District Court, to consider the cases as one, and to enter an order of sale in one of the cases, and to recite in that case the names of the lienors who have established their liens in either one of the cases, and the amount due on each as established by the judgments of the lower court, from which no appeal was taken, or by the Superior Court; and separate costs are properly allowed in each case.

Where several petitions to enforce mechanics' liens under Pub. Sts. c. 191, are tried together, if exceptions taken at the trial as to one of the claims are undisposed of, the proceeds of a sale ordered upon the establishment of the liens cannot be distributed under § 28, but must be held and disposed of under § 29, making provision for cases where all the claims are not ascertained.

An order of the Superior Court for the sale of property against which a mechanic's lien is established, and an order for distribution of the proceeds under Pub. Sts. c. 191, § 28, are so far separate and distinct that the order of sale may be valid and effective although the order of distribution may be invalid, and the judgment as to one of several claims of lien considered together may be valid notwithstanding the judgment upon another may be wrong.

FOUR PETITIONS, to enforce mechanics' liens, under Pub. Sts. c. 191. From the several orders of the Superior Court, which, together with the facts, appear in the opinion, the respondent appealed to this court.

C. B. Snow, Jr., for the respondent.

E. L. Packard, for the petitioners in the first and fourth cases.

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E. H. Fletcher, for the petitioners in the second case.

W. Goddard, for the petitioner in the third case, submitted the case on a brief.

HAMMOND, J. These are four separate suits brought originally in the Second District Court of Plymouth, under Pub. Sts. c. 191, to enforce liens for labor and materials. Although the petitioners are not the same in each suit, yet by an inspection of the respective records it appears that all parties interested, including the eleven lienors, became parties to each of the suits either by appearing voluntarily or in answer to an order of notice, so that at the time of the hearing in that court there were four suits pending in which the parties were the same, and in either one of which an order could have been entered determining the rights of all parties interested in the litigation.

The court did not adopt this course, but in the case of Johnson and others passed an order establishing liens in favor of seven of the petitioners, but finding for the respondent as against Swanstrom, the remaining petitioner; and in the three other suits ordered a personal judgment in favor of the respective petitioners against Wyzanski, the respondent. These orders and judgments were entered September 23, 1898. From them the respondent appealed to the Superior Court, except that in the case of Johnson and others he appealed only from the order establishing the lien of Willen, so that the judgment against Swanstrom and in favor of the six remaining petitioners in that case stands.

We have no occasion to notice the errors of the District Court with respect to the judgments and orders appealed from, because they were vacated by the appeal.

While no order of consolidation was made by the Superior Court, it is manifest that the cases there were considered together, and as in substance one case.

The claims as to which an appeal had been taken were tried together upon issues framed, and were submitted to the same jury, who found in favor of every claimant except Willen, but as to him found for the respondent. Whereupon the court made an order in the cases of Dahlborg, Sample, Forsberg, and Blomquist, establishing their respective liens, and in the Sample case entered an order of sale and distribution. This last order recites that liens had been established in favor of certain persons there-

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inafter named, for the sums set against their respective names, proceeds to name the persons, the list including all the lienors in the four cases who had succeeded in maintaining their liens; and it then directs that the property be sold by public auction by the sheriff, first giving due notice of the time and place thereof according to law.

The order further proceeds as follows: "It appearing that all the claims against said property are ascertained, and that no other proceedings are pending for the establishment of liens against the same," the officer making such sale is directed to dispose of the proceeds as provided by Pub. Sts. c. 191, § 28.

The parties being the same, we are of opinion that it was within the power of the Superior Court to consider the cases as one, and to enter the order of sale in the case in which it was entered; and also that it was within its power to recite in that case the names of the lienors who had established their liens in either one of these cases, and the amount due on each as established by the judgments of the lower court, from which no appeal was taken, or by the Superior Court.

But the respondent objects that at the time of the order of sale it was not true that the lien of Dahlborg had been established, because exceptions taken at the trial before the jury are yet undisposed of, and it does appear that there are such exceptions still pending.

It is apparent, therefore, that the proceeds of the sale cannot be distributed under Pub. Sts. c. 191, § 28, but must be held and disposed of under § 29 of that chapter, which makes provision for cases where all the claims are not ascertained.

But we think the order of sale and the order of distribution are so far separate and distinct that the order of sale may be valid and effective even although the order of distribution may be invalid; and that the judgment as to one claim may be valid notwithstanding the judgment upon another may be wrong.

We see no error in the findings and rulings of the court in the matter of allowing separate costs in each case.

The result is that the judgment of the court as to all the claims except that of Dahlborg and as to the order of sale is affirmed; but as to the claim of Dahlborg and the order of distribution it is reversed. *So ordered.*

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COMMONWEALTH *vs.* EDWARD F. O'BRIEN.

Bristol. October 23, 1899. — December 6, 1899.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Modifying Original Sentence — Imposing Sentence at a Sitting of the Court for Civil Business.

On December 8, 1897, a person, having been found guilty of obtaining property by false pretences on October 31, 1894, was immediately sentenced to imprisonment in the state prison for not less than three or more than five years. After announcing the sentence the clerk said, "Mr. Sheriff, the prisoner at the bar is in your custody under sentence." Exceptions having been taken, the judge soon after, at the defendant's request, made an order staying the execution of the sentence, and the prisoner, who had remained in the court-room with the sheriff, was admitted to bail. No transcript under Pub. Sts. c. 215, § 25, was ever delivered or made out. The exceptions, having been argued in this court in October, 1898, were overruled in November, 1898. On the receipt of the rescript the defendant was not present in the Superior Court and was defaulted. A capias was issued, on which he was arrested and brought before the court on January 16, 1899, at a regular sitting for the transaction of civil business, the District Attorney moving that such sentence should be imposed as would be applicable, having informed the judge that the original sentence was under St. 1895, c. 504, which had been held by this court inapplicable to offences committed before January 1, 1896. The judge, against the defendant's objection and subject to his exception, sentenced him to a term of three years in the state prison, the first day of which was to be in solitary confinement, and the balance at hard labor. *Held*, that the judge had the power to modify the original sentence and make it conform to the law, and that the objections that the sentence could not be imposed at a sitting of the court for the transaction of civil business, and that the judge was engaged in the transaction of civil business a little before and a little after imposing it, could not avail.

INDICTMENT, for obtaining property by false pretences. Hearing in the Superior Court before *Fessenden*, J., who imposed sentence as recited in the opinion, and the defendant alleged exceptions. The facts appear in the opinion.

C. R. Cummings, for the defendant.

L. LeB. Holmes, District Attorney, for the Commonwealth.

KNOWLTON, J. On December 8, 1897, the defendant was found guilty of having obtained property by false pretences, and was immediately sentenced to imprisonment in the state prison for not less than three years or more than five years. The offence was committed on October 31, 1894. After announcing

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the sentence the clerk said to the sheriff: "Mr. Sheriff, the prisoner at the bar is in your custody under sentence." Exceptions having been taken, the court, about a half or three quarters of an hour later, at the request of the defendant, made an order staying the execution of the sentence, and the prisoner was admitted to bail. In the meantime he had remained in the court-room in the custody of the sheriff. No transcript under the Pub. Sts. c. 215, § 25, was ever delivered or made out. The exceptions were argued in this court in October, 1898, and were overruled in November, 1898. *Commonwealth* v. *O'Brien*, 172 Mass. 248. On the receipt of the rescript the defendant was not present in the Superior Court, and was defaulted. A capias was issued, on which he was arrested and brought before the court on January 16, 1899, at a regular sitting held in Fall River for the transaction of civil business. While the court was in session the District Attorney moved for sentence against the defendant, and informed the presiding justice that the original sentence was under St. 1895, c. 504, which in the case of *Murphy* v. *Commonwealth*, 172 Mass. 264, had been held inapplicable to offences committed prior to January 1, 1896, and suggested to the court that a sentence should be imposed which would be applicable. Thereupon the court, against the defendant's objection and subject to his exception, sentenced him to a term of three years in the state prison, the first day of which was to be in solitary confinement and the balance at hard labor.

It is contended that the court had no power to modify the original sentence which had been imposed immediately after the trial. When criminal business could be done only at regular terms of the court held for that purpose, and before the enactment of the statute directing the imposition of sentence on conviction in all cases notwithstanding exceptions, it was held that sentences could be changed during the term of the court at which they were imposed and not afterwards. This rule was founded on the doctrine that the imposition of a sentence in a criminal case, when finally completed and embodied in the record of the court, was the end of the case, after which the proceeding was no longer pending, and the court was without jurisdiction to take further action, unless on an appeal or other authorized supplemental proceeding some error was discovered. Such a sentence

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was like the formal entry of a final judgment in a civil action, or the enrolment of a final decree in equity. But it was held that until the end of the term the final record was not completed, and that the matter remained so far in the breast of the judge that he could revise his action in regard to an unexecuted sentence, and change the judgment in any proper way. *Commonwealth* v. *Weymouth*, 2 Allen, 144. *Mason* v. *Pearson*, 118 Mass. 61. *Commonwealth* v. *Foster*, 122 Mass. 317, 323.

There are two recent statutes which modify this doctrine, the St. of 1895, c. 469, which directs the imposition of sentences on conviction notwithstanding exceptions, and gives power to the presiding justice or a justice of this court afterwards to stay the sentence; and the St. of 1897, c. 490, which abolished criminal terms. The effect of the first of these statutes is to continue in the Superior Court jurisdiction of the case for some purposes after the imposition of a sentence and after the expiration of the term at which the sentence is imposed. There is power in the court to make an order staying the execution of the sentence immediately after it is imposed, or at a later time, and admitting the defendant to bail or otherwise providing for his custody. This implies a power, if exceptions are overruled, to make an order which shall put the sentence in execution. The case remains in the Superior Court so far unfinished that the court has jurisdiction to make proper orders, not only to stay the execution of the sentence, but also at the proper time to enforce the sentence. The decision in *Commonwealth* v. *Hayes*, 170 Mass. 16, implies that, under the statute, the power of the court after exceptions are overruled to vacate the order staying the sentence, and to order the sentence executed, does not extend so far as to permit a further stay of the sentence on independent grounds not affecting the legality or propriety of the conviction. That case arose before the enactment of the statute abolishing terms, and the limitation of the revisory power of the court in regard to sentences to the term in which the sentence was imposed is referred to in the opinion. This decision does not conflict with the establishment of a rule that the power of the court to deal with the sentence whenever the exceptions are overruled, so far as to vacate the order staying execution, and to direct the execution of it, impliedly includes the power to correct any illegality

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or error in a sentence, provided it then remains wholly unexecuted. We see no good reason why this power should not be included. That the occasion is after the expiration of the sitting at which the sentence was imposed ought not to prevent the exercise of the power, in view of the implied authority at that time to deal with the sentence so far as to carry it into execution, and in view of the statute abolishing terms.

If the sentence in this case had been executed in part before the order staying it, a different question might have arisen, and the rights of the defendant might have been so affected by a change of the sentence that there should have been simply an order for execution of the sentence, and errors should have been left to be corrected upon a writ of error. See Pub. Sts. c. 187, § 13. *Murphy* v. *Commonwealth*, 172 Mass. 264. But the sentence was wholly unexecuted at the time of the order revising it. Up to the time of the stay of the sentence there had been no transcript such as is prescribed by the Pub. Sts. c. 215, § 25, as authority to an officer to execute the sentence, and as a preliminary to the execution of it. If there had been occasion for the sheriff to exercise authority over the defendant before the transcript was made out, he would have acted as an officer of the court and under its direction, in order that the prisoner might be detained until the order of sentence could be made complete by the preparation of the transcript and the delivery of it to the officer. The St. 1859, c. 248 (Gen. Sts. c. 174, § 21), which declares that a prisoner's sentence "shall be computed from the time he is ordered to remain in the custody of the sheriff," was repealed by St. 1880, c. 120, § 6, and is not now in force.

While the defendant was in the custody of the officer who held him upon a capias after his default, he was not held in execution of the sentence. The capias was issued, and he was arrested that he might be before the court, as he had agreed to be, for further proceedings which would put the sentence into execution. His rights were not injuriously affected by the change in the sentence. *Commonwealth* v. *Weymouth*, 2 Allen, 144, 147.

The remaining objection to the sentence is that it could not be imposed at a sitting of the court for the transaction of civil business. This objection is met by the following provision of St.

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1897, c. 490, § 1: "The Superior Court shall always be open for criminal business in every county, and there shall no longer be terms for such business. Any business of said court or of the justices thereof in criminal cases may be transacted at any time." Whenever and wherever the court chooses to sit for the transaction of criminal business in any county, except on Sundays, it may do such business. Under this statute trials by jury can only be had at regular or at specially authorized sittings.

The fact that the court was engaged in the transaction of civil business a little before and a little after imposing this sentence is immaterial. *Exceptions overruled.*

MICHAEL SULLIVAN *vs.* THORNDIKE COMPANY.

Hampden. September 27, 1899. — December 7, 1899.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Personal Injuries — Master and Servant — Act of Superintendence — Due Care — Assumption of Risk — Evidence.

In an action under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff by the fall of a freight elevator which he was employed to run in carrying material in process of manufacture from one department to another in the defendant's mill, the fall being caused by overloading the elevator with a quantity of material, the plaintiff testified, on direct examination, that A., who was the second hand in one of the rooms, told another workman to put the truck containing the material on the elevator, and then said to the plaintiff, "You take that up stairs"; that A. "gave orders to the help"; and that no one in that room "gave orders" to A. On re-cross-examination, he testified: "When the men were there at any time, whether they were second hands, or third hands, or common workmen, and put their load on the elevator, they used to tell where to take the load"; and that "when anybody gave what I call orders with respect to the load or weight, it was to tell where the load was to go and that was all there was of it." *Held*, that the plaintiff's testimony on re-cross-examination must be taken to be an explanation of what he meant by the word "orders" in his direct examination; and that, with this explanation, there was no evidence to warrant a finding that the direction given by A. was an act of superintendence.

It is not obvious to an ordinary man, who is not a mechanic, although he has had an experience of seven years in running such an elevator, and is familiar with its various parts, that if an elevator, which is suspended by two hemp ropes passing in grooves over a drum situated at the top of the well-hole in which it runs, and attached at one of their ends to the cross beam at the top of the ele-

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vator, and at the other to two counter weights running up and down behind wooden casings in the side of the well-hole, is overloaded, the ropes will slip in the grooves and the elevator fall; and he does not assume the risk of injury from such an accident.

At the trial of an action for personal injuries occasioned by the fall of an elevator, the cause of its fall is a proper subject for expert testimony, and the questions put to the witness in this case were competent.

TORT, for personal injuries occasioned to the plaintiff while in the employ of the defendant. At the trial in the Superior Court, before *Maynard*, J., the case was submitted to the jury on a count in the declaration under the employers' liability act, St. 1887, c. 270, alleging negligence of a superintendent, and on a count at common law, alleging failure to give the plaintiff proper and sufficient instructions and warnings in regard to the danger of his work.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. H. Brooks & W. Hamilton, for the defendant.

J. B. Carroll & W. H. McClintock, for the plaintiff.

LORING, J. The plaintiff was injured by the fall of a freight elevator in the defendant's mill.

On the day of the accident he came with the elevator in question to the spinning-room, which was on the fourth floor of the new part of the mill, and found there a truck loaded with ten boxes of yarn waiting for him. He testified that one Hutchinson, the second hand in the spinning-room, told one Real, who was standing by, to put the truck on the elevator, and said to the plaintiff, "Mr. Sullivan, you take that upstairs"; Real put the truck on the elevator, and one Laplant, who it appeared was going to the room below, got on the elevator; the plaintiff pushed the shipping-rod in the proper way to start upwards; the elevator rose an inch or so and then fell very rapidly to the bottom of the well, causing the injury complained of.

The elevator was suspended by two hemp ropes; these ropes passed over a drum situated at the top of the well-hole in which the elevator ran, and were attached at one of their ends to the cross beam at the top of the elevator, at the other to two counter weights which ran up and down behind wooden casings in the side of the well-hole. The drum had on its surface two grooves in which the ropes ran; a shaft was set in the centre of the

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drum, and this shaft was put in motion by two belts, one open, the other a cross belt running from the main shaft, shifting on to a tight pulley; when the open belt was shifted on to the tight pulley the shaft ran in one direction, and when the cross belt was shifted on, it ran in the opposite direction. There is a shipping-rod through the five stories of the factory; by moving this rod up, the open belt is thrown on the tight pulley and the elevator goes down; by moving the rod down, the cross belt is thrown on the tight pulley and the elevator goes up. The belts when put on the tight pulley start the shaft; the shaft starts the drum, and by the friction of the two ropes on the drum the elevator is raised or lowered.

The plaintiff had been employed by the defendant in running elevators for seven years. The plaintiff's regular elevator was in the new part of the defendant's mill, and the elevator on which the injury happened was in the old part of the mill. The plaintiff's duty in running both elevators was to carry the material in process of manufacture from one department to another department, as the different stages of manufacturing required.

The plaintiff testified that a good many times before the two days in question, when there was trouble with the elevator in the new part he had gone over and taken up the stuff he had to take up on the elevator in question in the old part, but that this had not happened very often altogether; that the two elevators were constructed in the same way, the only difference being that the elevator he used regularly had one, in place of two, ropes running over the drum; that he had oiled the pulleys and mechanism, and knew just what the office of the various parts was, and could see all there was to see; that he was under one Hughes, who kept his time and gave him orders; that he was originally hired, before Hughes was employed by the defendant, by the man who then had the position which Hughes had at the time of the accident, and he continued to work under the direction of Hughes, and was so working at the time in question; and that Hughes employed and discharged help. It is clear that Hughes was a superintendent within the employers' liability act.

On the day before the accident Hughes told the plaintiff to run the elevator in the old part, that is, the elevator in question. The plaintiff testified that he was not told by Hughes or any-

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body else not to overload the elevator, nor how much of a load the elevator would carry. The other elevator had stuck when he had too much of a load on, and once the other elevator had gone down with him.

It was admitted that the accident resulted from the load on the elevator being so much heavier than the counter weights that the friction was overcome, the ropes slid in the grooves, and the elevator fell rapidly from the fourth story to the bottom of the well-hole.

1. The presiding justice was asked to rule that there was no sufficient evidence that Hutchinson was a person intrusted with and exercising superintendence over the plaintiff.

The plaintiff testified on direct examination that he was told by Hughes to run the elevator, and that he, Hughes, would provide men to load and unload; that Hutchinson was second hand in the spinning-room; that he fixed frames and looked after the help to see if they were doing their business as they ought to; "he did nothing else as I know of; he gave orders to the help; I don't know how many employees there were in the spinning-room; I should think there were about twelve or fourteen men and women to whom Hutchinson gave orders; I should think there were about twenty in the other part that he gave orders to; . . . the rest of the time he was walking round to see how the work was going and see if the help was all right; I suppose he was giving orders to some of them"; that no one in that spinning-room gave orders to Hutchinson; "Hutchinson gave me some orders; I took my orders also from the third hand, the second hand, the overseer in each room; I took orders to do what they told me, take up this yarn, to do just as they told me, carry up yarn as I would be told to"; and that he had to go by their orders.

On re-direct examination the plaintiff testified that he had taken orders from the second and third hands with reference to taking up or down material in the elevators since he went to work for the defendant. On re-cross-examination he testified: "When the men were there at any time, whether they were second hands, or third hands, or common workmen, and put their load on the elevator, they used to tell where to take the load; just the same as Hutchinson has with any of the others; any of

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the people who were there in the mill and helped load the elevator would tell me where to take the load sometimes, but not all times, because I knew sometimes, but not many times; when anybody gave what I call orders with respect to the load or weight, it was to tell where the load was to go and that was all there was of it."

Hughes testified: "If a particular load was to go to a particular place, it was customary for them to tell him where the load had to go"; that so far as his observation went the load which the plaintiff would take up in the elevator depended on the doffs that came off the frames; sometimes they would not all doff, and there might be a box or two or three boxes different in the load. Again: "Occasionally in a while I might get a complaint that something was wrong in the elevator; if he was not satisfying, they would come to me; if there was anything the matter in the weaving or spinning room; boxes lying there that were not going up, they would come to me; sometimes it would not work as steadily as another; if their work was n't being done as fast as they wanted, they would tell they wanted so and so moved; I cannot say that they would tell me that Mr. Sullivan was not doing as they wanted to have him; I knew they were not satisfied; I expected Mr. Sullivan to satisfy them." Again: "I never knew Mr. Sullivan to obey any other person other than myself, any more than putting the stuff where they wanted it put."

Laplant testified: "In this room Real was the third hand; I had often seen when the elevator came to a certain room where there was material to be taken up to some other floor, I had often seen the second hand say to the elevator man, 'You take this to a certain floor,' and he would do it."

Real testified: "I went around this day and got all the boxes that were ready to go up, and I had done the same thing before, and the elevator man had always carried them up when I had prepared the load; that was the custom, and I never knew of an instance when he did not take up whatever load was prepared for him; I put the load on, and Mr. Hutchinson was right there."

Hutchinson, upon cross-examination, testified that he never saw the plaintiff throw back or refuse to take up any load that was prepared for him on any floor in the building.

Both Hughes and Hutchinson testified that it was for the

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plaintiff to decide how much to take on the elevator at any one time.

The presiding justice instructed the jury that if Hutchinson had the right to say to the plaintiff "'take these goods upstairs,' and it was the duty of the man to obey that, that would be a superintendence"; but that if Hutchinson merely gave a direction pointing out where the goods were to go, it was not superintendence. The instruction given was a correct statement of the law. *Whittaker* v. *Bent*, 167 Mass. 588. But on the whole we are of opinion that the plaintiff's testimony on re-cross-examination, ending up with the statement "when anybody gave what I call orders with respect to the load or weight, it was to tell where the load was to go and that was all there was of it," must be taken to be an explanation of what he meant by the word "orders" in his direct examination, and that, with this explanation of his testimony, there was no evidence on which the jury could find that the direction given by Hutchinson, even accompanied as it was by the act of Real in putting the yarn on the elevator, was an act of superintendence directing him to take the whole load of ten boxes which it was his duty to obey, but on the contrary that it was an indication by Hutchinson where the load was to go, accompanied by the act of Real in helping to load the elevator which Hughes had promised should be done.

In construing the statement found in the bill of exceptions as to the plaintiff's testimony on re-cross-examination, it is only fair to him to assume that the expressions stated to have been used by him are not his, but are those of the defendant's counsel in framing questions on re-cross-examination to which he assented; but he did assent to this explanation of the word "orders," and no further testimony was given by him on the point. On a fair interpretation of the whole testimony we are of opinion that the plaintiff's statement on re-cross-examination was meant to be an explanation; and that this was not a case where the jury might find that the plaintiff used the word "orders" on direct examination as meaning acts of superintendence ordering him to take a particular load, and where this testimony on re-cross-examination was a statement in conflict with that which, under the circumstances, the jury might or might not believe.

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If the jury believed the plaintiff's testimony as to the failure of Hughes to give him warning about the ability of this elevator to carry weight, it was entirely immaterial whether the direction of Hutchinson was the command of a superintendent or an indication of destination. The plaintiff's right to recover would have been made out by proof that Hughes set him to work on the elevator, which, when carrying too great a load for the counter weights, necessarily fell to the bottom of the well, without telling him so and telling him how much the elevator would carry. Under these circumstances it would have been immaterial whether the plaintiff was directed by a superintendent to carry this truck load of ten boxes of yarn to the floor above, or was told by a fellow servant that the destination of the truck load was the floor above.

But the plaintiff was to some extent contradicted by Hughes as to this, and he did not put his case on this ground; he did put his case on the ground that Hutchinson was a superintendent, that Hutchinson directed him to take the ten boxes as one load, that the direction was an act of superintendence, and that Hutchinson was negligent in directing him to take so large a load. Since the case was left to the jury on that issue, and there is no evidence on which the jury could find for the plaintiff on that issue, we feel forced to sustain this exception.

The case must go back for a new trial, and therefore we will briefly dispose of the other questions raised here which are likely to be raised again.

2. The defendant requested a ruling to the effect that there was no sufficient evidence, first, of due care by the plaintiff, and, second, that the plaintiff did not assume the risk of the injury which he sustained. The request was rightly refused. It is not obvious to a man who does not appear to be a mechanic, that in case of such an elevator as this was, the ropes would slip and the elevator would fall, if it was overloaded. It is doubtless true, as this accident showed, that if such an elevator is overloaded the ropes will slip in the grooves and the elevator will fall, and one skilled in mechanics would, or at least ought to, appreciate that result; but that result is not obvious to an ordinary man, even with the plaintiff's experience of seven years in running a similar elevator, in respect to which he testified that he knew the

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office of the various parts and had seen all there was to see; and he himself testified: "I did not know that this elevator would carry but just so much"; "I did not know or have information from anybody how much this elevator would carry"; "I did not know that if it was overloaded it would drop; I did not know that if I got too much of a load on it would come down." We think that the jury was justified in believing that these statements were true.

3. We are of opinion that the subject testified to by Webber was a proper subject for expert testimony, and the particular questions were competent.* *New trial ordered.*

COMMONWEALTH *vs.* ULDERIC L. ST. PIERRE.

Bristol. October 23, 1899. — December 13, 1899.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Unregistered Physician — Evidence on Cross-examination — Res Gestæ — Burden of Proof — Proof sufficient to support Complaint — Instructions.

At the trial of a complaint for holding one's self out as a physician and surgeon without being registered according to law, the government having put in testi-

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* These questions were as follows: "1. Assuming that that elevator went up an inch with a certain load on it, and then fell immediately to the bottom floor with a greater degree of speed than it would go down of its natural operation, what do you say was the cause of it? 2. What do you say, whether that [the fact that the rods under the elevator floor were bent] indicates anything in reference to the action of the tappet? 3. If these irons were bent after the accident, what would that indicate as to whether they had struck the bottom of this well? 4. What would that indicate as to the cause of that elevator not being stopped? 5. If after the accident these braces which held the V-shaped irons underneath the floor of the elevator were bent an inch in towards the floor of the elevator and the tappet on the side of the shipping-rod was not broken or bent, assume they were not, what is the explanation of that? 6. Whether or not if the motion were given pulling down on the elevator shipping-rod and the elevator instead of going up slipped down, whether or not the elevator would go eighteen inches farther down before the tappet would perform any work than it would if the opposite direction were given, namely, the bearing up of the shipping-rod?"

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mony to the effect that the defendant had given directions and advice as to the use of the contents of certain packages and bottles sold by him, and had been paid by the persons to whom the contents were sold, testimony offered by him on cross-examination that on each and every occasion at the time the parties were told by him that he was not a doctor and that he did not charge for his services, should have been admitted.

At the trial of a complaint for holding one's self out as a physician and surgeon without being registered according to law, the burden is on the defendant to show that he is a registered physician, if he relies on such a justification; and this applies where the absence of a license is made part of a description of the offence.

If a complaint charges the defendant with holding himself out as a physician and surgeon without being registered according to law, proof that he acted either as a physician or surgeon is sufficient to support the complaint.

At the trial of a complaint for holding one's self out as a physician and surgeon without being registered according to law, a ruling that if the defendant held himself out as an eye specialist he held himself out as "one who devoted himself to a branch of the healing art, which is the profession of the physician and surgeon," and that "if the defendant held himself out as an eye specialist he held himself out as a physician and surgeon within the meaning of the statute," is correct.

COMPLAINT, under St. 1894, c. 458, § 10, entitled "An Act to provide for the registration of physicians and surgeons," as amended by St. 1895, c. 412, to the Second District Court of Bristol, alleging that the defendant, on January 1, 1898, "and on divers other days and times between that day and the day of making this complaint," at Fall River, "did hold himself out to the public as a physician and surgeon, without being then and on the said other days and times duly registered as a physician by the Board of Registration in Medicine . . . according to law."

At the trial in the Superior Court, before *Hopkins*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

J. Bennett, for the defendant.

L. LeB. Holmes, for the Commonwealth.

LORING, J. 1. The exception to the exclusion of the testimony offered by the defendant on cross-examination must be sustained. The government had introduced in evidence testimony of a number of persons to the effect that they had visited the defendant at various times; that he gave to them medicines, and advised them how to use them; that at these times they had conversations with him about the nature of their complaints; that he afterwards visited some of them at their houses

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and treated them there, and that they paid him money; and the bottles and packages, which the witnesses testified were given to them, had been put in evidence.

The defendant offered to prove that "on each and every occasion at the time the parties were told by the defendant that he was not a doctor, and that he did not charge anything for his services." This evidence was excluded.

If the defendant sold the medicines, receiving payment therefor, and gave advice gratuitously as to the use to be made of them, he was not, so far as those instances were concerned, holding himself out as a physician; his declarations accompanying the acts, and showing the character of them, were admissible as part of the *res gestæ*. Of course it was open to the government to contend that in these instances he was really acting as a physician, and was paid as such for his services, and that these statements were efforts to evade the statutory provisions here in question.

But when the Commonwealth put in testimony to the effect that he had given directions and advice as to the use of the contents of the packages and bottles sold by him, and had been paid by the persons to whom the contents were sold, it was the right of the defendant to prove that in each instance he was paid, not for the advice, but only for the drugs, and that he declared that he was not a physician; and in that way to raise the question whether, so far as these instances were concerned, he was selling the drugs and giving information gratuitously as to their use, and therefore not thereby holding himself out as a physician, or whether he was really acting as a physician taking payment therefor, and was seeking by such declarations to evade the effect of his actions. This question was a question for the jury, under all the circumstances, and the testimony offered should have been admitted.

As the questions involved in the other exceptions may arise in a new trial, they may be briefly disposed of here.

2. The burden was on the defendant to show that he was a registered physician, if he relied on such a justification. Pub. Sts. c. 214, § 12. This applies in cases where the absence of a license is made part of a description of the offence. *Commonwealth* v. *Kelly*, 10 Cush. 69. *Commonwealth* v. *Tuttle*, 12 Cush.

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502. *Commonwealth* v. *Barnes*, 138 Mass. 511. *Commonwealth* v. *McCarty*, 141 Mass. 420.

3. Proof that the defendant acted either as a physician or surgeon was sufficient to support the complaint which charged him with holding himself out as a physician and surgeon. There is but one offence, and that may be committed by the defendant's holding himself out as a physician or a surgeon; if the complaint charges that the offence is committed by the defendant's holding himself out both as a physician and surgeon, the whole offence is proved if he is shown to have held himself out as either. *Commonwealth* v. *Dolan*, 121 Mass. 374.

4. The ruling that if the defendant held himself out as an eye specialist he held himself out as "one who devoted himself to a branch of the healing art, which is the profession of the physician and surgeon," and that "if the defendant held himself out as an eye specialist he held himself out as a physician and surgeon, within the meaning of the statute," was correct.

New trial ordered.

EMMA BLANCHETTE *vs.* HOLYOKE STREET RAILWAY COMPANY.

Hampden. September 27, 1899. — December 16, 1899.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Personal Injuries — Instructions — "Gross Negligence" — Negligence of Conductor of Street Car — Custom — Declarations.

If an action for personal injuries, occasioned to the plaintiff by being thrown from an electric car by reason of its coming into collision with the rear end of another car, rests entirely upon evidence of negligence of the conductor after the trolley came off, and this negligence was nearer to the accident in point of time and more closely connected with it as a cause than the throwing off of the trolley, a request for instructions that "the proximate cause of the collision or contact of the two cars was the throwing off by a passenger of the trolley of the first car, and the plaintiff cannot recover because of any injury to her as the result of the collision," is rightly refused.

In an action for personal injuries, occasioned to the plaintiff by the collision of two electric cars, a finding that the gross negligence of the conductor of the forward

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car was the cause of the collision is unnecessary to the decision of the case; it is sufficient to find negligence.

In an action for personal injuries, occasioned to the plaintiff by being thrown from an electric car by reason of its coming into collision with the rear end of another car, it appeared that the place of the accident was between a park on a mountain and a street in a city, that the tracks of the railroad ran through woods on a down grade with frequent curves, the curve just before the place of the accident being of such a kind that the motorman of the second car could see only about one hundred and fifty feet ahead, that a light rain had fallen and the tracks were very slippery, so that the brakes would not hold well, that the second car left two minutes after the first, that all this was known to the conductor of the first car, and yet when the trolley came off, instead of letting his car go by its own momentum down the grade, he signalled to stop it, and when it stopped after going some distance, instead of giving warning to the other car which was approaching from behind, he proceeded to get on the top of the car to adjust the trolley, and the collision occurred. *Held*, that there was evidence to warrant a finding of negligence on the part of the conductor.

In an action for personal injuries, occasioned to the plaintiff by being thrown from an electric car by reason of its coming into collision with the rear end of another car, it appeared that the place of the accident was away from the highway, on a track running down from a mountain, through fields and woods, by a series of curves, and on a steep grade to a certain street, and that the cars ran rapidly, and the first car was followed by the second after an interval of only two minutes. The defendant offered to show that it was not customary for the motorman to leave his post at the front of the car and go back to give warning to any approaching car of the position of the car ahead, or of the conductor to give him any such directions. *Held*, that the evidence was rightly excluded.

In an action for personal injuries occasioned to a minor, the extent thereof being in dispute, declarations of the mother tending to show that the plaintiff was not so ill as represented are not admissible to bind the plaintiff without proof of conspiracy; and the fact that the mother kept the outside door of the house locked may well be regarded as immaterial, even if it were done with the knowledge of the plaintiff.

In an action for personal injuries occasioned to a minor, the extent thereof being in dispute, it appeared that the plaintiff's mother and another daughter, E., had some talk in the presence of the witness about cutting out a dress pattern, and the mother said that she could not do it and she would go into the plaintiff's room; that the mother and E. went into the room, and in a short time came out with the pattern cut out properly. *Held*, that there was no direct evidence that the plaintiff did in fact cut out the dress pattern, and the evidence offered might well be considered by the judge as showing only that the plaintiff's advice was sought, and not manual labor on her part.

TORT, for personal injuries occasioned to the plaintiff, a minor, while a passenger on an electric car of the defendant. Trial in the Superior Court, without a jury, before *Maynard*, J., who found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

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W. H. Brooks & W. Hamilton, for the defendant.

A. L. Green, for the plaintiff.

LATHROP, J. The plaintiff was a passenger on an open electric car of the defendant company on Sunday, May 30, 1897, and there was evidence which would warrant a finding that she was thrown from the car by reason of its coming into collision with the rear end of another car of the defendant. The justice of the Superior Court, who tried the case without a jury, found specially that the plaintiff was in the exercise of due care, and was injured; that the collision of the defendant's cars was the cause of the injury; and that the gross negligence of the conductor of the forward car was the cause of the collision. Damages were assessed in the sum of $5,000. The case is before us on the defendant's exceptions.

1. The first exception which is argued is to the refusal of the judge to give the fourth request for instructions, which was as follows: "The proximate cause of the collision or contact of the two cars was the throwing off by a passenger of the trolley of the first car, and the plaintiff cannot recover because of any injury to her as the result of the collision."

Whether the throwing off of the trolley was so closely connected with the accident as a cause that it might have been made a ground of liability if there had been no intervening or other cause, and if the action had been brought against the passenger who threw it off, or if it had been thrown off by a negligent act of the defendant's servant, it is unnecessary to determine. The plaintiff's case rests entirely upon evidence of negligence on the part of the conductor after the trolley came off; and this negligence was nearer to the accident in point of time, and more closely connected with it as a cause, than the throwing off of the trolley. This request for instructions was rightly refused.

2. The seventh request was: "There is no sufficient evidence that the injury to the plaintiff was caused by the negligence of the conductor of the first car, and the plaintiff is not entitled to recover on that ground."

Before proceeding to consider this request, it may be remarked that the finding that the gross negligence of the conductor of the forward car was the cause of the collision was unnecessary

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to the decision of the case. It would have been enough to find negligence.

We are of opinion that on the facts of the case there was evidence to warrant a finding of negligence on the part of the conductor. The place of the accident was between Mountain Park and Northampton Street, in Holyoke. The tracks of the railroad ran through woods, on a down grade, with frequent curves. The curve just before the place of the accident was of such a kind that the motorman of the second car could see only about one hundred and fifty feet ahead. A light rain had fallen, and the tracks were very slippery, so that the brakes would not hold well. The second car left two minutes after the first. All this was known to the conductor of the first car, and yet, when the trolley came off, instead of letting his car go by its own momentum down the grade, he signalled to stop it, and when it stopped after going some distance, instead of giving warning to the other car which was approaching from behind, he proceeded to get on the top of the car to adjust the trolley, and the collision occurred.

3. The defendant offered to show that it was not customary for the motorman to leave his post at the front of the car and go back to give warning to any approaching car of the position of the car which is ahead, or for the conductor to give him any such directions. If the offer was to show the defendant's own custom in answer to a charge of negligence, the evidence was plainly incompetent. If it was to show a general custom on electric railways, the offer was to prove a negative, and it related to other railways as they are constructed. It does not appear that there is any other electric railway situated as this is, or that a trolley ever came off on another railway in such a place. The place of this accident was away from the highway, on a track running down from Mountain Park on Mount Tom, through fields and woods, by a series of curves, and on a steep grade to Northampton Street. The cars run rapidly there, and the first car was followed by the second after an interval of only two minutes. The situation was so unlike that of electric railways generally, that the absence of a custom on such railways to do that which ought to have been done at the place and under the circumstances of this accident is of no significance. The evidence was rightly excluded.

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4. The extent of the injury to the plaintiff was in dispute, and there was conflicting evidence on the subject given by medical experts. In this condition of things the defendant offered to show by a person who boarded in the family certain declarations and acts by the plaintiff's mother tending to show that the plaintiff was not so ill as was represented. This evidence was excluded, and the defendant excepted. It does not appear from the exceptions that any conspiracy between the mother and daughter was charged, nor was any such charge made by the defendant on its brief. Without proof of conspiracy, any declarations made by the mother were inadmissible to bind the daughter. The fact that the mother kept the outside door of the house locked might well be regarded as immaterial, even if it were done with the knowledge of the daughter. The attempt to show that the mother took food in to the daughter concealed under her apron failed, as the witness testified that she did not know that what was so taken was anything to eat. The only other act relied on is that the plaintiff's mother and another daughter, Eva, had some talk in the presence of the witness about cutting out a dress pattern, and the mother said that she could not do it, and she would go into the plaintiff's room; that the mother and Eva went into the plaintiff's room, and in a short time came out with the pattern cut out properly. The offer of proof assumed that the plaintiff was a dressmaker. We are of opinion that the judge might properly exclude this evidence. There was no direct evidence that the plaintiff did in fact cut out the dress pattern; and the evidence offered might well be considered by the judge as showing only that the plaintiff's advice was sought, and not manual labor on her part.

Exceptions overruled.

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FRANCES W. FITCH *vs.* MARIETTA R. JEFFERSON.

Middlesex. November 24, 1899. — December 16, 1899.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Petition to prove Exceptions — Trial — Motion to set aside Verdict — Requests for Rulings.

As a general rule no inquiry into the merits of a bill of exceptions is open on a petition to prove them, but it is perfectly logical to dismiss such a petition on the ground that there is nothing in the exceptions if they are proved.

The judge presiding at a session of the Superior Court announced that he should require the plaintiff in a case, who was in court, to try his case with another case which had been called for trial. The plaintiff's counsel thereupon having withdrawn from the case, the pleadings were read by the defendant's counsel. There was no exception taken by the plaintiff, and no notice given that he did not regard his case as before the jury. After the pleadings had been read the plaintiff in person asked leave of the judge to become nonsuit, but the defendant's counsel refused his assent, and thereupon the judge ordered a verdict for the defendant, all without exception or any intimation that the plaintiff did not understand his case to be before the jury. *Held*, that there was a trial, and that a motion to set aside the verdict was within Rule 46 of the Superior Court, requiring a motion for a new trial to be filed within three days after the verdict.

PETITION, to establish the truth of exceptions alleged by Frances W. Fitch in an action of tort brought by her against Marietta R. Jefferson, and disallowed by *Sherman*, J., who presided at the trial in the Superior Court.

The bill of exceptions as filed set forth that, when another case was called for trial, the judge ordered the present case to be tried with it; that the plaintiff's counsel, after protesting against the order, withdrew from the case; that as soon as the other case had been opened to the jury, the judge directed the defendant's attorney in the present case, upon the plaintiff's attorney declining to do so, to read the pleadings in the case, which he did; that the trial of the other case thereafter proceeded, and the present plaintiff, being a witness therein, remained in court as a witness and not otherwise; that she was not called to prosecute this case, and no other counsel appeared for her after the withdrawal above stated; that no evidence was offered on either side in the case; that upon the

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plaintiff's "leaving the judge's desk after telling him that she desired to become nonsuit rather than have her case tried then without her most important witnesses," the judge said to the defendant's counsel that the plaintiff desired to become nonsuit, and asked if he would consent to it; and that the defendant's counsel replied that he would not agree to it, and the judge thereupon directed the jury to return a verdict for the defendant.

Annexed to the petition were two motions "to set aside the verdict," the first, which was filed fourteen days after the verdict was rendered, setting forth, in substance, the facts alleged in the bill of exceptions as the grounds therefor, and the second, which was filed two months later, setting forth the non-arrival of depositions of important witnesses until long after the verdict was rendered, as the ground therefor. At the hearing upon these motions the plaintiff made several requests for rulings. The judge denied the motions, and refused to give the rulings requested; and the plaintiff alleged exceptions. The defendant moved that the plaintiff's petition be dismissed.

C. Cowley, for the plaintiff.

F. N. Wier, for the defendant.

HOLMES, C. J. As a general rule no inquiry into the merits of a bill of exceptions is open upon a petition to prove them. Ordinarily it is not proper to call upon the court to pass upon a question of law until that question is proved to have arisen in the proceedings sought to be revised. But while it appears to us better to adhere to the rule pretty strictly, the rule is rather one of convenience and propriety than of absolute law. It is perfectly logical to dismiss a petition to prove exceptions on the ground that there is nothing in them if they are proved.

The motion before us perhaps falls in strictness under the general principle which we have laid down, but the form which the argument took before us, and the concessions of the counsel for the petitioner, have reduced the question to a single short point, and a point which, although it goes to the validity of the exceptions, does not touch their contents, or at most touches them only indirectly. It will save expense and time if we dispose of the case now, and, as we have a clear opinion upon the point to which we have referred, we have decided to do so.

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The exceptions are to the overruling of two motions styled motions to set aside the verdict, and to the refusal of rulings asked in connection with the second of these motions. The ground of objection is that the motions really were motions for a new trial and came too late, and that the rulings should have been asked at the trial. The rulings need not be set forth. It is enough that they all might have been presented before the verdict was entered. The counsel for the plaintiff conceded that if there had been a trial he had no case. Although we might not have entertained this motion apart from the concession, nothing was admitted by it that was not indisputable law. If these were motions for a new trial they were filed too late, under Rule 46 of the Superior Court. Moreover, the rulings asked were all rulings which should have been asked before the verdict was rendered. *Sullivan* v. *Boston Bar Association*, 170 Mass. 504.

It seems to us that on the face of the exceptions there was a trial within the meaning of the rule of the Superior Court, and of decisions like that just cited. The presiding judge had announced that he should require the plaintiff to try the case with another case which had been called for trial. The plaintiff was in court, as a witness, it may be, but still there. The plaintiff's counsel having withdrawn from the case after the order that the cases should be tried together, the pleadings were read by the defendant's counsel. There was no exception taken by the plaintiff and no notice given that she did not regard her case as before the jury. It is implied by the bill of exceptions that after the pleadings had been read and evidence had been put in in the other case, the plaintiff in person asked leave of the judge to become nonsuit, but that the counsel for the defendant refused his assent, and that thereupon the judge ordered a verdict for the defendant; all without exception or any intimation that the plaintiff did not understand her case to be before the jury. Whether the judge's order was right or wrong, it appears to us too late, days after the verdict was entered, to come before the court on the footing that all that had happened was a nullity. We are of opinion that there was a trial, and that the motions are within the rule of the Superior Court. We are of opinion, also, that, irrespective of what the proceedings in court may be

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called, the principle which forbids questions of law which might have been raised at the trial being raised by afterthought upon a motion for a new trial, applies equally to requests for rulings which, if correct, would have prevented the entry of the verdict in this case. The plaintiff had the same standing for an exception at the time of the verdict as afterwards on the motion to set the verdict aside, and could have taken an exception for want of jurisdiction without losing her rights. If she was out of court so that she could not except, she remained out of court at the time of the motion, and her remedy is by a different proceeding. *Petition dismissed.*

JAMES H. FROTHINGHAM, executor, & others, *vs.* EDWARD P. SHAW.

Essex. January 24, 1899. — December 18, 1899.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

Tax on Collateral Legacies and Successions — Will — "Property within the Jurisdiction of the Commonwealth" — Succession by the Laws of the Commonwealth.

At the trial of a petition by the executor of a will for instructions as to the payment of a collateral inheritance tax on the residuary legacies, it appeared that when the testator died he was domiciled at S. in this Commonwealth, and nearly all his estate, consisting of bonds and stock of foreign corporations, a certificate of indebtedness of a foreign corporation, bonds secured by mortgage on real estate in New Hampshire, the makers living in New York, and of cash on deposit with a savings bank and with individuals in Brooklyn, was and had been for many years with his agents in New York. There had been no administration in New York, and the petitioner had taken possession of all the property except the real estate, and had paid all debts and legacies except the residuary legacies, and none of the legacies were entitled to exemption if otherwise liable to the tax. *Held*, that the stocks, bonds, etc., were "property within the jurisdiction of the Commonwealth," within the meaning of St. 1891, c. 425, § 1, and that the succession took place by virtue of the laws of this Commonwealth.

PETITION, to the Probate Court, by the executor of the will of Joseph Frothingham, for instructions as to the payment of a collateral inheritance tax on the residuary legacies. The case was heard on agreed facts, and came here by successive appeals

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from decrees of the Probate Court and of a single justice of this court finding that the tax was payable, and directing the executor to pay the same. The facts appear in the opinion.

G. R. Nutter & T. L. Frothingham, (of New York,) for the petitioners.

A. W. DeGoosh, Assistant Attorney General, for the respondent.

MORTON, J. At the time of his death the testator was domiciled at Salem, in this Commonwealth, and his estate, except certain real estate situated here and appraised at $2,100, and cash in a savings bank in Salem amounting to $993, was, and for many years had been, in the hands of his agents in New York, and consisted of bonds and stock of foreign corporations, a certificate of indebtedness of a foreign corporation, bonds secured by mortgage on real estate in New Hampshire, the makers living in New York, and of cash on deposit with a savings bank and with individuals in Brooklyn; — the total being upwards of $40,000.

There has been no administration in New York, and the petitioners have taken possession of all the property except the real estate, and have paid all of the debts and legacies except the residuary legacies. None of the legacies are entitled to exemption if otherwise liable to the tax.

The petitioners contend that the stocks, bonds, etc., were not "property within the jurisdiction of the Commonwealth," within the meaning of St. 1891, c. 425, § 1, and that, if they were, the succession took place by virtue of the law of New York and not of this State.

It is clear that if the question of the liability of the testator to be taxed in Salem for the property had arisen during his lifetime he would have been taxable for it under Pub. St. c. 11, §§ 4, 20, notwithstanding the certificates, etc., were in New York; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *State Tax on Foreign-Held Bonds*, 15 Wall. 300; Cooley, Taxation, (2d ed.) 371; and the liability would have extended to and included the bonds secured by mortgage. *Kirtland* v. *Hotchkiss* and *State Tax on Foreign-Held Bonds*, *ubi supra*. *Hale* v. *County Commissioners*, 137 Mass. 111. It is true that the Public Statutes provide that personal property wherever situated, whether within or without

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the Commonwealth, shall be taxed to the owner in the place where he is an inhabitant. But it is obvious that the Legislature cannot authorize the taxation of property over which it has no control, and the principle underlying the provision is that personal property follows the person of the owner, and properly may be regarded, therefore, for the purposes of taxation, as having a situs at his domicil, and as being taxable there. After the testator's death the property would have been taxable to his executors for three years or until distributed and paid over to those entitled to it, and notice thereof to the assessors; showing that the fiction, if it is one, is continued for the purposes of taxation after the owner's death. Pub. St. c. 11, § 20, cl. 7. *Hardy* v. *Yarmouth*, 6 Allen, 277. In the present case the tax is not upon property as such, but upon the privilege of disposing of it by will, and of succeeding to it on the death of the testator or intestate, and it "has some of the characteristics of a duty on the administration of the estates of deceased persons." *Minot* v. *Winthrop*, 162 Mass. 113, 124. *Callahan* v. *Woodbridge*, 171 Mass. 595. *Greves* v. *Shaw*, 173 Mass. 205. *Moody* v. *Shaw*, 173 Mass. 375. In arriving at the amount of the tax the property within the jurisdiction of the Commonwealth is considered, and we see no reason for supposing that the Legislature intended to depart from the principle heretofore adopted, which regards personal property for the purposes of taxation as having a situs at the domicil of its owner. This is the general rule, Cooley on Taxation, (2d ed.) 372; and though it may and does lead to double taxation, that has not been accounted a sufficient objection to taxing personal property to the owner during his life at the place of his domicil, and we do not see that it is a sufficient objection to the imposition of succession taxes or administration duties under like circumstances after his death.

In regard to the mortgage bonds it is to be noted, in addition to what has been said, that this case differs from *Callahan* v. *Woodbridge*. In that case the testator's domicil was in New York, and it does not appear from the opinion that the note and mortgage deed were in this State. In this case the domicil was in this Commonwealth, and we think that for the purposes of taxation the mortgage debt may be regarded as having a situs here. This is the view taken in Hanson's Death

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Duties, (4th ed.) 239, 240, which is cited apparently with approval by Mr. Dicey, though he calls attention to cases which may tend in another direction. See Dicey, Confl. of Laws, 319, note 1.

It seems to us, therefore, that for the purposes of the tax in question the property in the hands of the executor must be regarded as having been within the jurisdiction of this Commonwealth at the time of the testator's death. See *In re Swift*, 137 N. Y. 77; *Miller's estate*, 182 Penn. St. 157.

The petitioners further contend that the succession took place by virtue of the law of New York. But it is settled that the succession to movable property is governed by the law of the owner's domicil at the time of his death. This, it has been often said, is the universal rule, and applies to movables wherever situated. *Stevens* v. *Gaylord*, 11 Mass. 256. *Dawes* v. *Head*, 3 Pick. 128, 144, 145. *Fay* v. *Haven*, 3 Met. 109. *Wilkins* v. *Ellett*, 9 Wall. 740; *S. C.* 108 U. S. 256. *Freke* v. *Carbery*, L. R. 16 Eq. 461. *Attorney General* v. *Campbell*, L. R. 5 H. L. 524. *Duncan* v. *Lawson*, 41 Ch. D. 394. *Sill* v. *Worswick*, 1 H. Bl. 665, 690. Dicey, Confl. of Laws, 683. Story, Confl. of Laws, (7th ed.) §§ 380, 481.

If there are movables in a foreign country, the law of the domicil is given an extraterritorial effect by the courts of that country, and in a just and proper sense the succession is said to take place by force of and to be governed by the law of the domicil. Accordingly, it has been held that legacy and succession duties as such were payable at the place of domicil in respect to movable property wherever situated, because in such cases the succession or legacy took effect by virtue of the law of domicil. *Wallace* v. *Attorney General*, L. R. 1 Ch. 1. Dicey, Confl. of Laws, 785. Hanson's Death Duties, 423, 526.

With probate or estate or administration duties as such it is different. They are levied in respect of the control which every government has over the property actually situated within its jurisdiction irrespective of the place of domicil. *Laidlay* v. *Lord Advocate*, 15 App. Cas. 468, 483. Hanson's Death Duties, (4th ed.) 2, 63.

Of course any State or country may impose a tax and give it such name or no name as it chooses, which shall embrace, if so

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intended, the various grounds upon which taxes are or may be levied in respect of the devolution of estates of deceased persons, and which shall be leviable according as the facts in each particular case warrant. In England, for instance, the estate duty, as it is termed, under the Finance Act of 1894 (57 & 58 Vict. c. 30) has largely superseded the probate duty, and under some circumstances takes the place of the legacy and succession duty also. Hanson's Death Duties, (4th ed.) 62, 63, 81.

But whatever the form of the tax, the succession takes place and is governed by the law of the domicil; and, if the actual situs is in a foreign country, the courts of that country cannot annul the succession established by the law of the domicil. *Dammert* v. *Osborn*, 141 N. Y. 564. In further illustration of the extent to which the law of the domicil operates, it is to be noted that the domicil is regarded as the place of principal administration, and any other administration is ancillary to that granted there. Payment by a foreign debtor to the domiciliary administrator will be a bar to a suit brought by an ancillary administrator subsequently appointed. *Wilkins* v. *Ellett* and *Stevens* v. *Gaylord*, *ubi supra*. *Hutchins* v. *State Bank*, 12 Met. 421. *Martin* v. *Gage*, 147 Mass. 204. And the domiciliary administrator has sufficient standing in the courts of another State to appeal from a decree appointing an ancillary administrator. *Smith* v. *Sherman*, 4 Cush. 408. Moreover, it is to be observed, if that is material, that there has been no administration in New York, that the executor was appointed here, and has taken possession of the property by virtue of such appointment and must distribute it and account for it according to the decrees of the courts of this Commonwealth. To say, therefore, that the succession has taken place by virtue of the law of New York would be no less a fiction than the petitioners insist that the maxim *mobilia sequuntur personam* is when applied to matters of taxation.

The petitioners contend that in *Callahan* v. *Woodbridge* it was held that the succession to the personal property in this State took place by virtue of the law of this State, although the testator was domiciled in New York. We do not so understand that case. That case and *Greves* v. *Shaw* and *Moody* v. *Shaw*, *ubi supra*, rest on the right of a State to impose a tax or duty in

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respect to the passing on the death of a non-resident of personal property belonging to him and situated within its jurisdiction. We think that the decree should be affirmed.

So ordered.

CHARLES B. PRESCOTT *vs.* JOSEPH P. PRESCOTT.

Hampden. September 27, 1899. — January 2, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Devise and Legacy — Prescription — Easement — Equity Practice.

A., by his will, devised to B. for life the dwelling-house occupied by B., together with the land on which it stood, the lines of which were described; and also devised his own adjacent dwelling-house and the land on which it stood, after his wife's death, to his grandson, C. A walk constructed of artificial stone ran from the street along the northerly side of B.'s house to a side door and to the back part of the house, in such a position that the boundary line of his lot as described in the will ran longitudinally through the walk, one foot in width of the stone being on B.'s side of the line and two feet on C.'s side. There was also a paved driveway leading back from the street to a barn on C.'s property in such a position that the northerly side of the driveway was twenty-six feet distant from the line described in the will. B.'s house was built by A., who was his father-in-law, and had been occupied ever since by B. and his family. A walk was constructed from this house through the grounds to A.'s dwelling-house on the adjacent lot. The driveway was used occasionally by B., and he and A. and their families passed back and forth in daily intercourse between the houses. The portion of the grounds between B.'s house and the driveway was occupied by him. A. paid the taxes on B.'s house and lot, the house was insured in A.'s name, a man in his employ was accustomed to mow the grass on both lots, and there was nothing before A.'s death to indicate that B. made any adverse claim to the property. *Held*, on a bill in equity by B. against C., that B. had not acquired by prescription any rights in the land northerly of the boundary described in the will; and that there was no such connection shown between the driveway and B.'s house, or between his house and the land between the stone walk and the driveway as to create an easement in favor of his lot.

After an exception has been taken to an order dismissing a bill in equity, and before the expiration of the time for filing a bill of exceptions, a formal final decree properly cannot be entered, but the case should be left open upon the order for a final decree until the time for filing a bill of exceptions has passed, or until the decision of the question of law raised by the exception.

BILL IN EQUITY, filed August 2, 1898, in the Superior Court, to restrain an alleged interference with the plaintiff's use of

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certain premises in Holyoke. Hearing before *Bond*, J., who ordered that the bill be dismissed, with costs; and the plaintiff alleged exceptions. A decree was entered in accordance with the order; and the plaintiff appealed to this court. The facts appear in the opinion.

A. B. Chapin, for the plaintiff.

A. L. Green, for the defendant.

KNOWLTON, J. The parties are in dispute in regard to the location of the boundary line between their adjacent lots. The plaintiff claims under a clause in the will of Joseph C. Parsons, as follows: "I give, devise and bequeath to Charles B. Prescott of Holyoke the dwelling-house on the easterly side of Chestnut Street in said Holyoke now occupied by him, together with the lot of land upon which said dwelling is situated, said lot extending from land of H. P. Terry and Austin Ely northerly on said Chestnut Street, and on the centre line of an alley in the rear of said lot a distance of sixty-two and a half feet. He, the said Prescott, to pay all taxes and assessments upon said premises during his life, to keep said premises well insured and to make all necessary repairs. To have and to hold the same with the appurtenances to him, the said Charles B. Prescott, during the term of his natural life. On his decease the remainder of said estate I give, bequeath and devise to my granddaughter, Kittie T. Prescott, to have and to hold the same to her, her heirs and assigns forever." The defendant claims under the following language of the same will: "I also give, bequeath and devise to my said wife for and during her natural life, the dwelling-house in which I now reside and the lot on which it stands, together with all other buildings on said lot. On her death the remainder of said real estate described in this provision of the will, to wit: the land and buildings where I now reside, I give, bequeath and devise to my grandson, Joseph P. Prescott, to have and to hold the same to him, his heirs and assigns forever." The widow of the testator has since deceased. The first wife of the plaintiff was the daughter of said Parsons, and the defendant is his grandson. A walk constructed of artificial stone runs from the street along the northerly side of the plaintiff's house to a side door and to the back part of the house, in such a position that the boundary line of the plain-

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tiff's lot as described in the will runs longitudinally through the walk, with one foot in width of the artificial stone on the plaintiff's side of the line and two feet in width on the defendant's side of the line. There is also a paved driveway leading back from the street to a barn on the defendant's property, in such a position that the northerly side of the driveway is twenty-six feet distant from the line described in the will. The plaintiff's house was built by Parsons, and has been occupied ever since by the plaintiff and his family. A walk was constructed from this house through the grounds to Parsons's dwelling-house on the adjacent lot. The driveway was used occasionally by the plaintiff, and he and Parsons and their families passed back and forth daily in familiar intercourse between the two houses. The judge found that the portion of the grounds between the plaintiff's house and the driveway was occupied by the plaintiff.

One question presented by this bill is, whether the plaintiff has acquired by prescription any rights in the land northerly of the boundary described in the will. We think it is clear that he has not. Without considering the nature of his occupation since the decease of Parsons, which occurred in 1886, it is plain that previously his occupation was permissive, and that the legal relations between the parties were those of landlord and tenant. Parsons paid the taxes on the plaintiff's house and lot, the plaintiff's house was insured in Parsons's name, a man in his service was accustomed to mow the grass on both lots, and there is nothing to indicate that the plaintiff made any adverse claim to the property.

We must therefore consider the legal effect of the devise under which the plaintiff claims. The lines of the lot are fixed by the language of the will. The plaintiff has an estate for life in the land within the designated boundaries. The first question is, whether the rights in the driveway and in the land between the driveway and the artificial stone walk passed as appurtenant to the plaintiff's house and land.

Under the rule of law as it is stated in *Salisbury* v. *Andrews*, 19 Pick. 250, 253, *Whitney* v. *Olney*, 3 Mason, 280, 284, *Johnson* v. *Jordan*, 2 Met. 234, 240, and *Philbrick* v. *Ewing*, 97 Mass. 133, 135, there is nothing to show any such close connection

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between the driveway and the plaintiff's house, or between the plaintiff's house and the land between the walk and the driveway, as to create an easement in favor of the plaintiff's lot. Whether the artificial stone walk along the northerly side of the house to the steps leading up to the piazza and into the northerly door is of such a character, and is so closely connected with the house in construction and in the use of the house in its present form, that it must be deemed an appurtenance which passed by the will, and which the defendant cannot destroy by cutting off that part which is on his land, is a question that is not raised by this bill of exceptions. The exceptions cannot be sustained unless they show an error of law in the proceedings. The plaintiff testified that the defendant, after sending a notice, not only put a chain across the driveway, but brought wire and commenced to build a fence to shut the plaintiff off from the northerly part of the walk. The defendant admitted that he put a chain across the driveway, but denied that he purchased any wire or posts, or made any effort to erect a fence to prevent the plaintiff from using the walk.

The judge "found from the evidence that the defendant did not, in any way, interfere with the use of the path or walk shown on the plan, leading from the street to the side or rear door of the house occupied by the plaintiff." From the conduct of the defendant, and his testimony, he may have found that whether the plaintiff had a right to have the artificial stone walk remain there or not, there was no such danger that the defendant would interfere with his use of it as to call for a remedy by injunction. The bill of exceptions does not state on what ground the judge found for the defendant, and as it contains this specific finding on this part of the case, it is possible, if not probable, that the decision as to the walk was made without reference to the question of title, and was on the ground that the plaintiff had not shown any need of relief in equity. We therefore express no opinion in regard to the walk.

The case shows an informality in the proceedings. The hearing is upon a bill of exceptions allowed by the judge. The exceptions show an order that the bill be dismissed with costs, the entry of a final decree, and an appeal. The allowance of

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the exceptions must be taken as showing that an exception was seasonably taken to the order dismissing the bill. After an exception to the order, duly taken, and before the expiration of the time for filing a bill of exceptions, a formal final decree could not properly be entered, but the case should have been left upon the order for a final decree until the time for filing a bill of exceptions had passed, or until the decision of the question of law raised by the exception. A formal entry of a final decree in equity corresponds to the entry of a final judgment, as distinguished from an order of judgment in an action at law. This decree has no greater effect than an order for a decree.

Exceptions overruled.

MARY A. WELSH, petitioner.

Suffolk. March 21, 1899. — January 3, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Court of Registration — Report before Entry of Decree — Statute — Deed — Restriction.

Under St. 1899, c. 131, § 2, the Court of Registration may report a case for the consideration of this court, although no order or decree has been entered, if the case is ripe for judgment or decree, and the report shows that a decree would be entered if it were not for the question of law, and provides for a decree when the doubt upon that question is resolved.

A deed contained the restrictions, "that the said grantee or his heirs or assigns shall not for a period of ten years erect on the granted premises any buildings or parts thereof which shall be used or occupied for any other purposes than dwelling-houses, and private stables, and buildings usually appurtenant to dwelling-houses, except the corner-lots, which may be used for store purposes, and said dwellings to be occupied by none but respectable families, and that no building, or part of any shall be erected within fifteen feet of the front line of each lot, and that no dwelling-house shall be erected thereon to cost less than" a sum named. *Held*, that the words "for a period of ten years" governed the entire clause.

PETITION, for a registered title under the land registration act, St. 1898, c. 562. At the hearing before the Court of Registration the following facts were found.

The premises as to which a registered title is sought are a

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certain parcel of land situated between Edson Street, formerly called Prospect Avenue, and Milton Avenue in that part of Boston called Dorchester.

The petitioner claims title under two several deeds from Benjamin P. Cunningham to G. A. Durham, dated September 16, 1871, and recorded. Each deed contained the following clause:

"Subject to the following restrictions, viz.: that the said grantee or his heirs or assigns shall not for a period of ten years erect on the granted premises any buildings or parts thereof which shall be used or occupied for any other purposes than dwelling-houses, and private stables, and buildings usually appurtenant to dwelling-houses, except the corner lots, which may be used for store purposes, and said dwellings to be occupied by none but respectable families, and that no building, or part of any shall be erected within fifteen feet of the front line of each lot, and that no dwelling-house shall be erected thereon to cost less than" a sum named.

Cunningham acquired title in 1870 to an entire tract including these two lots, shown on a plan annexed to the report, caused the plan to be recorded in the registry of deeds, and sold off the lots shown thereon to different persons by deeds containing the same restrictions as above set forth. These restrictions constituted a general plan for the benefit of the entire tract.

The title, except for the above restrictions, and subject to certain other matters not material to this report, is suitable for registration.

It was contended by an examiner on behalf of the Commonwealth that the restriction that "no building or part of any shall be erected within fifteen feet of the front line of each lot" is still in force.

The court ruled as matter of law that the words "for a period of ten years" governed the entire clause in regard to restrictions, and that none of the restrictions are now in force as to the premises; but, inasmuch as error of law in this ruling might expose the Commonwealth to numerous suits for damages under the provisions of the land registration act, reported the case for the consideration of this court.

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If the ruling was right, a decree for registration was to be entered without mention of the restrictions; otherwise, any decree for registration should be made subject to the restrictions, so far as the same might be determined to be in force.

C. H. Swan, Jr., for the petitioner.

HOLMES, C. J. A doubt has been felt by some members of this court whether this report, which discloses only a ruling of law and no order or decree, is within the authority conferred upon the Court of Registration by the statutes. St. 1898, c. 562, § 14. St. 1899, c. 131, § 2. The former section provided that "every order, decision, and decree" of the Court of Registration should be subject to appeal. The latter adds that the Court of Registration "after any decision or decree dependent upon the determination of questions of law may report such decision or decree for the consideration of" this court. The argument is that "decision" in the earlier section meant something that could be appealed from, that is, a formal order or decree upon the record, and that it must mean the same thing in the amendment. But it seems to most of us that this is taking the words in somewhat too strict a sense. It seems to us enough if the case is ripe for judgment or decree and the report shows that a decree would be entered were it not for the question of law, and provides for a decree when the doubt upon that question is resolved. Under such circumstances the actual entry of the decree before sending the case up is a pure form. See *Commonwealth* v. *Teevens*, 141 Mass. 577. We agree that what we have pronounced sufficient is the least that will do, and that a question cannot be reported when it does not appear that an order or decree will follow the decision as a consequence.

My brethren are of opinion that the ruling of the court should be sustained. Had the decision rested with me alone I probably should have ruled the other way, upon the ground that grammatically the limitation "for a period of ten years" comes between the words "shall not" and "erect," and qualifies only a distinct restriction. But it seems to them that the structure of the whole paragraph is too confused for the argument from grammar to be of much force; that it is rather to be inferred, looking at the restrictions all together, that the time limitation was intended to apply throughout; that at least the words are so doubt-

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ful that they should be taken most strongly against the grantor; and that the construction adopted is helped by the consideration that the other one would make the petitioner's lot almost useless.

Decree accordingly.

WILLIAM B. TYLER *vs.* JUDGES OF THE COURT OF REGISTRATION.

Suffolk. October 4, 1899. — January 3, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Land Registration Act — Constitutional Law.

The St. of 1898, c. 562, entitled "An Act to provide for registering and confirming titles to land," is not unconstitutional, in that the original registration deprives all persons except the registered owner of any interest in the land without due process of law, in that it gives judicial powers to the recorder and assistant recorders after the original registration, although not judicial officers under the Constitution, or in that there is no provision for notice before registration of transfers or dealings subsequent to the original registration. LATHROP & LORING, JJ., dissenting.

PETITION, for a writ of prohibition against the judges of the Court of Registration established by St. 1898, c. 562, entitled "An Act to provide for registering and confirming titles to land," to prohibit them from proceeding further in registering the title to a certain parcel of land and determining the boundaries between it and an adjoining parcel of land belonging to the petitioner.

At the hearing before *Hammond*, J., the only question raised was whether the statute was constitutional, the petitioner contending that the original registration deprives all persons except the registered owner of any interest in the land without due process of law (14th Amendment Const. U. S., Declaration of Rights, Art. 12), that the statute gives judicial powers to the recorder and assistant recorders after the original registration, although not judicial officers under the Constitution (Const. Mass. c. 2, § 1, art. 9; c. 3, art. 1. Declaration of Rights, art. 30), and that, there being no provision for notice before registration of transfers or dealings subsequently to the original regis-

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tration, the effect is to deprive persons of their property without due process of law. The judge reserved the question for the determination of the full court.

J. L. Thorndike, for the petitioner.

H. M. Knowlton, Attorney General, & *F. T. Hammond*, Assistant Attorney General, for the respondents.

HOLMES, C. J. This is a petition for a writ of prohibition against the judges of the Court of Registration established by St. 1898, c. 562, and is brought to prevent their proceeding upon an application concerning land in which the petitioner claims an interest. The ground of the petition is that the act establishing the court is unconstitutional. Two reasons are urged against the act, both of which are thought to go to the root of the statute and to make action under it impossible. The first and most important is that the original registration deprives all persons except the registered owner of any interest in the land without due process of law. There is no dispute that the object of the system, expressed in § 38, is that the decree of registration "shall bind the land and quiet the title thereto," and "shall be conclusive upon and against all persons," whether named in the proceedings or not, subject to few and immaterial exceptions. And this being admitted, it is objected that there is no sufficient process against, or notice to, persons having adverse claims, in a proceeding intended to bar their possible rights.

The application for registration is to be in writing and signed and sworn to. It is to contain an accurate description of the land, to set forth clearly other outstanding estates or interests known to the petitioner, to identify the deed by which he obtained title, to state the name and address of the occupant if there is one, and also to give the names and addresses so far as known of the occupants of all lands adjoining. § 21. As soon as it is filed, a memorandum containing a copy of the description of the land concerned is to be filed in the registry of deeds. § 20. The case is immediately referred to an examiner (appointed by the judge, § 12), who makes as full an investigation as he can and reports to the court. § 29. If in the opinion of the examiner the applicant has a good title as alleged, or if the applicant after an adverse opinion elects to proceed further, the recorder is to publish a notice by order of the court in some newspaper

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published in the district where any portion of the land lies. This notice is to be addressed by name to all persons known to have an adverse interest, and to the adjoining owners and occupants so far as known, and to all whom it may concern. It is to contain a description of the land, the name of the applicant, and the time and place of the hearing. § 31. A copy is to be mailed to every person named in the notice whose address is known, and a duly attested copy is to be posted in a conspicuous place on each parcel of land included in the application, by a sheriff or deputy sheriff, fourteen days at least before the return day. Further notice may be ordered by the court. § 32.

It will be seen that the notice is required to name all persons known to have an adverse interest, and this of course includes any adverse claim, whether admitted or denied, that may have been discovered by the examiner, or in any way found to exist. Taking this into account, we should construe the requirement in § 21 concerning the application, as calling upon the applicant to mention not merely outstanding interests which he admits, but equally all claims of interest set up although denied by him. We mention this here to dispose of an objection of detail urged by the petitioner, and we pass to the general objection that, however construed, the mode of notice does not satisfy the Constitution, either as to persons residing within the State upon whom it is not served, or as to persons residing out of the State and not named.

If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims, — indeed certainty against the unknown may be said to be its chief end, — and unknown claims cannot be dealt with by personal service upon the claimant. It seems to have been the impression of the Supreme Court of Ohio, in the case most relied upon by the petitioner, that such a judicial proceeding is impossible in this country. *State* v. *Guilbert*, 56 Ohio St. 575, 629. But we cannot bring ourselves to doubt that the Constitutions of the United States and of Massachusetts at least permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims

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without any notice or judicial proceeding at all. Time and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case. *Wheeler* v. *Jackson*, 137 U. S. 245, 258. The same result used to follow upon proceedings which, looked at apart from history, may be regarded as standing half way between statutes of limitations and true judgments *in rem*, and which took much less trouble about giving notice than the statute before us. We refer to the effect of a judgment on a writ of right after the *mise* joined and the lapse of a year and a day; Booth, Real Actions, 101, *in margine;* Fitz. Abr. Continual Claim, pl. 7, *Faux Recovere*, pl. 1; Y. B. 5 Ed. III. 51, pl. 60; and of a fine with proclamations after the same time or by a later statute after five years. 2 Bl. Com. 354. 2 Inst. 510, 518. St. 18 Ed. I., *modus levandi fines*. 34 Ed. III. c. 16. 4 & 5 Hen. VII. c. 24. 32 Hen. VIII. c. 36. It would have astonished John Adams to be told that the framers of our Constitution had put an end to the possibility of these ancient institutions. A somewhat similar statutory contrivance of modern days has been held good. *Turner* v. *New York*, 168 U. S. 90. Finally, as was pointed out by the counsel for the petitioner, a proceeding *in rem* in the proper sense of the word might give a clear title without other notice than a seizure of the *res* and an exhibition of the warrant to those in charge. 2 Browne, Civ. & Adm. Law, 398. The general requirement of advertisement in admiralty cases is said to be due to rules of court. U. S. Adm. Rule 9. Betts, Adm. Practice (1838), 33, 34, App. 14.

The prohibition in the Fourteenth Amendment of the Constitution of the United States against a State depriving any person of his property without due process of law, and that in the twelfth article of the Massachusetts Bill of Rights, refer to somewhat vaguely determined criteria of justification, which may be found in ancient practice; *Murray* v. *Hoboken Land & Improvement Co.* 18 How. 272, 277; or which may be found in convenience and substantial justice, although the form is new. *Hurtado* v. *People*, 110 U. S. 516, 528, 531. *Holden* v. *Hardy*, 169 U. S. 366, 388, 389. The prohibitions must be taken largely, with a regard to substance rather than to form, or they are likely to do more harm than good. It is not enough to show

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a procedure to be unconstitutional to say that we never have heard of it before. *Hurtado* v. *People*, 110 U. S. 516, 537.

Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem* dealing with a tangible *res* may be instituted and carried to judgment without personal service upon claimants within the State or notice by name to those outside of it, and not encounter any provision of either Constitution. Jurisdiction is secured by the power of the court over the *res*. As we have said, such a proceeding would be impossible, were this not so, for it hardly would do to make a distinction between the constitutional rights of claimants who were known and those who were not known to the plaintiff, when the proceeding is to bar all. *Pennoyer* v. *Neff*, 95 U. S. 714, 727. *The Mary*, 9 Cranch, 126, 144. *Mankin* v. *Chandler*, 2 Brock. 125, 127. *Brown* v. *Levee Commissioners*, 50 Miss. 468, 481. Freem. Judgments, (4th ed.) §§ 606, 611. In *Hamilton* v. *Brown*, 161 U. S. 256, a judgment of escheat was held conclusive upon persons notified only by advertisement to all persons interested. It is true that the statute under consideration required the petition to name all known claimants, and personal service to be made on those so named. But that did the plaintiffs no good, as they were not named. So a decree allowing or disallowing a will binds everybody, although the only notice of the proceedings given be a general notice to all persons interested. And in this case, as in that of escheat just cited, the conclusive effect of the decree is not put upon the ground that the State has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem*. *Bonnemort* v. *Gill*, 167 Mass. 338, 340. See 161 U. S. 263, 274. Admiralty proceedings need only to be mentioned in this connection, and further citation of cases seems unnecessary.

Speaking for myself, I see no reason why what we have said as to proceedings *in rem* in general should not apply to such proceedings concerning land. In *Arndt* v. *Griggs*, 134 U. S. 316, 327, it is said to be established that "a State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication." In *Hamilton* v. *Brown*, 161 U. S.

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256, 274, it was declared to be within the power of a State "to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons." I doubt whether the court will not take the further step when necessary, and declare the power of the States to do the same thing after notice by publication alone. See *Huling* v. *Kaw Valley Railway & Improvement Co.* 130 U. S. 559, 564; *Parker* v. *Overman*, 18 How. 137, 140, 141 *et seq.* But in the present case provision is made for notice to all known claimants by the recorder, who is to mail a copy of the published notice to every person named therein whose address is known. § 32. We shall state in a moment our reasons for thinking this form of notice constitutional. See further *Cook* v. *Allen*, 2 Mass. 462, 469, 470; *Dascomb* v. *Davis*, 5 Met. 335, 340; *Brock* v. *Old Colony Railroad*, 146 Mass. 194, 195.

But it is said that this is not a proceeding *in rem*. It is certain that no phrase has been more misused. In the past it has had little more significance than that the right alleged to have been violated was a right *in rem*. Austin thinks it necessary to quote Leibnitz for the sufficiently obvious remark that every right to restitution is a right *in personam*. So as to actions. If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*, although it may concern the right to or possession of a tangible thing. *Mankin* v. *Chandler*, 2 Brock. 125, 127. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. Freem. Judgments, (4th ed.) § 606 *ad fin.* All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected. Hence the *res* need not be personified and made a party defendant, as happens with the ship in the admiralty; it need not even be a tangible thing at all, as

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sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendant are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result, nothing more.

It is true as an historical fact that these symbols are used in admiralty proceedings, and also, again merely as an historical fact, that the proceedings *in rem* have been confined to cases where certain classes of claims, although of very divers sorts, — for indemnification for injury, for wages, for salvage, etc., — are to be asserted. But a ship is not a person. It cannot do a wrong or make a contract. To say that a ship has committed a tort is merely a shorthand way of saying that you have decided to deal with it as if it had committed one, because some man has committed one in fact. There is no *a priori* reason why any other claim should not be enforced in the same way. If a claim for a wrong committed by a master may be enforced against all interests in the vessel, there is no juridical objection to a claim of title being enforced in the same way. The fact that it is not so enforced under existing practice affords no test of the powers of the Legislature. The contrary view would indicate that you really believed the fiction that a vessel had an independent personality as a fact behind the law. Furthermore, naming the *res* as defendant, although a convenient way of indicating that the proceeding is against property alone, that is to say, that it is not to establish an infinite personal liability, is not of the essence. If, in fact, the proceeding is of that sort, and is to bar all the world, it is a proceeding *in rem*.

Then as to seizure of the *res*. It is convenient in the case of a vessel, in order to secure its being on hand to abide judgment, although in the case of a suit against a man jurisdiction is regarded as established by service without the need of keeping him in prison to await judgment. It is enough that the personal service shows that he could have been seized and imprisoned. Seizure, to be sure, is said to be notice to the owner. *Scott* v. *Shearman*, 2 W. Bl. 977, 979. *Mankin* v. *Chandler*, 2 Brock. 125, 127. But fastening the process or a copy to the mast would seem not necessarily to depend for its effect upon the continued custody of the vessel by the marshal. However this may be, when we come to deal with immovables there

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would be no sense whatever in declaring seizure to be a constitutional condition of the power of the Legislature to make a proceeding against land a proceeding *in rem*. *Hamilton* v. *Brown*, 161 U. S. 256, 274. The land cannot escape from the jurisdiction, and, except as security against escape, seizure is a mere form, of no especial sanctity, and of much possible inconvenience.

I do not wish to ignore the fact that seizure, when it means real dispossession, is another security for actual notice. But when it is considered how purely formal such an act may be, and that even adverse possession is possible without ever coming to the knowledge of a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference; or rather, to express my view still more cautiously, I cannot but think that the immediate recording of the claim is entitled to equal effect from a constitutional point of view. I am free to confess, however, that, with the rest of my brethren, I think the act ought to be amended in the direction of still further precautions to secure actual notice before a decree is entered, and that, if it is not amended, the judges of the court ought to do all that is in their power to satisfy themselves that there has been no failure in this regard before they admit a title to registration.

The quotations which we have made show the intent of the statute to bind the land, and to make the proceedings adverse to all the world, even if it were not stated in § 35, or if the amendment of 1899 did not expressly provide that they should be proceedings *in rem*. St. 1899, c. 131, § 1. Notice is to be posted on the land just as admiralty process is fixed to the mast. Any person claiming an interest may appear and be heard. § 34.

But perhaps the classification of the proceeding is not so important as the course of the discussion thus far might seem to imply. I have pursued that course as one which is satisfactory to my own mind, but for the purposes of decision a majority of the court prefer to assume that in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent in order to render a valid judgment against them, it is not in the power of the Legislature, by changing the form of the proceeding from an action *in personam* to a suit *in rem*, to avoid the

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necessity of giving such a notice, and to assume that under this statute personal rights in property are so involved and may be so affected that effectual notice and an opportunity to be heard should be given to all claimants who are known or who by reasonable effort can be ascertained.

It hardly would be denied that the statute takes great precautions to discover outstanding claims, as we already have shown in detail, or that notice by publication is sufficient with regard to claimants outside the State. With regard to claimants living within the State and remaining undiscovered, notice by publication must suffice of necessity. As to claimants living within the State and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by a messenger and sending it by the post office beside publishing in a newspaper, recording in the registry, and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer, or that the copy served shall be officially attested. Apart from local practice, it may be served by any indifferent person. It may be served on residents by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seems to us within the power of the Legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice, when other means of notifying the party, like publishing and posting, also are required. We agree that such an act as this is not to be upheld without anxiety. But the difference in degree between the case at bar and one in which the constitutionality of the act would be unquestionable seems to us too small to warrant a distinction. If the statute is within the power of the Legislature, it is not for us to criticise the wisdom or expediency of what the Legislature has done.

We do not think it necessary to refer to the elaborate collection of statutes presented by the Attorney General for the purpose of showing that the principle of the present act is old.*

* The Attorney General cited: Ala. Code, 1896, §§ 690, 3165. Sts. Ark. 1894, §§ 2851–2855, 2859, 5418. 8 Cal. Code, §§ 756, 757, 759, 766, cls. 1–3. Sts. Col. §§ 3350, 3351, 3358, 3753, 3759. Gen. Sts. Conn. 1888, §§ 945,

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Although no question is made on that point, we may mention that an appeal is given to the Superior Court with the right to claim a jury. In our opinion, the main objection to the act fails. See *Shepherd* v. *Ware*, 46 Minn. 174; *People* v. *Simon*, 176 Ill. 165; *Short* v. *Caldwell*, 155 Mass. 57, 59; *Loring* v. *Hildreth*, 170 Mass. 328.

The other objection to the constitutionality of the statute is with regard to the powers and duties of the recorder and assistant recorder. It is said that they are given judicial powers after the original registration, although not judicial officers under the Constitution. The act of registration is the operative act to convey title, § 50; and by the act of 1898 the assistant recorder does it unless in doubt. §§ 53, 55, 57, 58, 61, 62, 63. It is said that as his decision affects title it must be judicial. But here again it is necessary to use a certain largeness in interpreting broad constitutional provisions. The ordinary business of registration is very nearly ministerial. There is no question to be raised or which can be raised. If there is a question, either raised by any

946. Rev. Sts. Fla. §§ 1493, 1495. Ga. Code, 1895, §§ 3577, 4893, cls. 1–3; § 4976, cls. 1–8. Rev. Sts. Idaho, 1887, §§ 4561, 4564, 4565, 4574, cls. 1–3; § 4595. Sts. Ill. c. 22, §§ 7, 43; c. 41, §§ 18–20, 22–25, 27, 34, 35, 38; c. 106, §§ 7–10, 35. Rev. Sts. Ind. 1894, § 320, cls. 4, 5; §§ 2491, 2494. Iowa Code, 1897, §§ 3538, 4228, 4229, 4236. Rev. Sts. Maine, 1883, c. 88, § 22. Sts. Maine, 1895, c. 80, §§ 1, 3–6; c. 85, § 49. Md. Code Pub. Gen. Laws, 1888, art. 16, §§ 111–115. Sts. Mich. 1882, §§ 6744–6746, 7860, 7861, 7880, cls. 1–3. Sts. Minn. 1894, §§ 5771, 5817, 5818, 5839–5842. Miss. Code, §§ 498, 499, 518, 1703–1706, 3421, 3424. Mo. Code, 1896, §§ 395, 400, 401, 468, 1364–1368, 1737. 2 Mont. Code, 1895, §§ 1348, 1351, 1361, cls. 1–3. Comp. Sts. Neb. 1895, § 5675. Pub. Sts. N. H. c. 243, §§ 1–5, 8, 10–12. Sts. N. J. 1881, c. 176, §§ 1, 2; 1893, c. 142, §§ 1, 2. Sts. N. Y. 1890, c. 503, §§ 1–7. N. Y. Code Civil Procedure, § 438, cls. 1, 5; §§ 1541, 1582, 1979, 2518, 2523. Sts. N. C. 1887, c. 284, §§ 1–3. Sts. Ohio, §§ 5053, 6416, 6419. Gen. Sts. Oregon, 1892, §§ 426, 427, 432, cls. 1–3. 1 Brightly's Purdon's Digest, p. 606, § 185; 2 Brightly's Purdon's Digest, p. 1639, § 5; p. 1641, § 16; 3 Pepper & Lewis' Digest, p. 504, § 8; p. 507, § 12. Gen. Sts. R. I. 1896, c. 265, §§ 8, 16, 17, 24–26. Rev. Sts. S. C. 1893, §§ 2438–2440, 2444. Sts. So. Dak. 1899, §§ 6598, 6607, cl. 2; § 6696. Tenn. Code, 1896, §§ 3826, 3828, 5018–5021, 5023, 5040, cls. 1–3. Rev. Sts. Texas, 1895, arts. 1821–1830. Sts. Vt. 1894, §§ 2549–2551. Va. Code, 1887, §§ 2400–2402. Wash. Code, § 5066, cls. 1–3; §§ 5557, 5558, 5560, 5561. W. Va. Code, 1891, c. 42, §§ 6, 7; c. 79, §§ 1, 4; c. 124, §§ 11, 12. Sts. Wis. 1898, §§ 1197, 1208, 2612, 3102, 3116, cls. 1–3; §§ 3186, 3196. Rev. Sts. Wyo. 1887, §§ 3009, 3010.

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party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision. § 53. But whatever may be thought of the original act, by amendment even the ordinary business is to be done only "in accordance with the rules and instructions of the court." St. 1899, c. 131, § 8. Under this amendment registration is the act of the court. The fact that it may be done by the assistant recorder under general orders when there is no question is not different from the power of the clerk to enter judgment in cases ripe for judgment under a general order or rule of the Superior Court. It should be observed that by § 55 the production of the owner's duplicate certificate whenever any voluntary instrument is presented for registration is conclusive authority from the registered owner for the entry of a new certificate or the making of a memorandum of registration, and that a registration procured by presenting a forged certificate, etc., is void.

Finally, it is said that there is no provision for notice before registration of transfers or dealings subsequent to the original registration. It must be remembered that at all later stages no one can have a claim which does not appear on the face of the registry. The only rights are registered rights, and when land is brought into the registry system there seems to be nothing to hinder the Legislature from fixing the conditions upon which it shall be held under that system. *People* v. *Simon*, 176 Ill. 165, 176. By § 45, the obtaining of a decree of registration, which is a voluntary act, is an agreement running with the land that the land shall be and remain registered land and subject to the provisions of the act. Furthermore, in deciding whether substantial justice is done it is to be borne in mind that ordinary cases will present no question at all. It is contemplated, as we have said, that if there is a question to be discerned it shall be referred to the court, and of course that the court will order notice to any party interested. The act shows throughout the intent that no one shall be concluded without having a chance to be heard, and, although some of its methods are new to this Commonwealth, we cannot say that the precautions as to notice are insufficient in substance or form.

Petition denied.

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LORING, J. I dissent from the opinion of the majority of the court, and think it proper to state the reasons which have brought me to the opposite conclusion.

It will be necessary to add to the statement of the general scope of the act, which is given in the opinion, by setting forth with some particularity those provisions, which, in the opinion of the majority of the court, sufficiently secure to those having adverse interests, that opportunity to be heard in defence of their rights of property, which is guaranteed to them by the constitutional provisions, that they shall not be deprived of their property except by due process of law or the law of the land. Fourteenth Amendment of the Constitution of the United States. Massachusetts Declaration of Rights, Art. 12.

By St. 1898, c. 562, §§ 31 and 32, notice of the application is to be issued by the court in a form specified in the act addressed to all known persons who claim an adverse interest and "to all whom it may concern," and the return day of the notice is to be not less than twenty nor more than sixty days from the date of the notice.

This notice is to be served (1) by publication "in some newspaper published in the district where any portion of the lands lie" (§ 31); (2) by posting it "in a conspicuous place on each parcel of" the land in question fourteen days before the return day (§ 32); and (3) by mailing a copy "to every person named therein whose address is known," within one week after publication in the newspaper. The posting of the notice is to be performed by a sheriff or his deputy (§ 32); the publication and mailing by the recorder of the court (§§ 31, 32); and the return of the former and the affidavit of the latter are made by § 32 "conclusive proof of such service."

It is provided that by the description in the notice "to all whom it may concern," "all the world are made parties defendant and shall be concluded by the default and order" (§ 35), which, by the terms of § 36, "shall first be entered against all persons who do not appear and answer" on the return day.

Thirty days are allowed for an appeal from a decree in favor of the applicant (§ 14), and, on the expiration of that time, by the express provisions of § 38, the decree, confirming and registering the applicant's title, "shall not be opened by reason of

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the absence, infancy, or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees," except only in case the decree was procured by the fraud of the applicant and rights of innocent third persons have not intervened. § 38.

The peculiarities of the act consist: first, in the fact that it bars or may bar the true owner, by a decree in a proceeding had in his absence, of which he did not in fact have notice, and to which he is not named as a party; second, in the fact that the notice to be given to those who are named therein is inappropriate and inadequate to bring home to them knowledge of the proceeding and enable them to appear and defend their right; third, in the fact that the return and affidavit of service by the sheriff and the recorder cannot be shown to be either false or incorrect; and fourth, in the fact that the decree made in that proceeding, unlike any other judgment or decree known to the law, is final and not subject to be attacked directly or collaterally, even if made in the absence of the true owner and without the true owner having in fact received any notice of the proceeding.

The Chief Justice upholds the statute upon the ground that the proceeding is a proceeding *in rem;* if it be such a proceeding, it is true that no person need be named as party respondent, and no notice beyond publication need be given. But some of the other justices who concur in the opinion prefer to uphold the statute upon the ground that the opportunity to appear and be heard afforded by the notice here provided is not so far different from that afforded by personal service, or its equivalent, in an action *in personam*, as to forbid the Legislature adopting it. On what ground the majority, who deny that this is a proceeding *in rem*, place their conclusion that those not named as respondents either in the application or in the notice are barred, is not explicitly stated.

I will first deal with the question of the notice to be given to known respondents, that is, to those named in the notice issued by the court. It is patent that one having an adverse interest is not sure to receive notice of the proceeding, and to receive that notice in time to be heard. He may not see the notice posted on his own land; the parcel of land may be, for example,

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woodland, and many thousand acres in extent; or the owner may be properly absent from the county for the fourteen days in question, or he may have given possession of the land to a tenant, and therefore properly leave it unvisited; or he may be a remainderman, and have no immediate right of entry, and certainly no likelihood of seeing a notice posted on the land; again, his interest in the land may be a right of way over, or of light and air in, the land of his neighbor, or an easement in the nature of an equitable restriction upon the height or position of buildings to be erected and maintained thereupon; in that case the notice would be posted on his neighbor's land, and there is certainly no likelihood that he would see a notice posted there. One publication in one newspaper in the district where the land lies, to be made "immediately upon the filing of the examiners' opinion, or the applicant's election, as the case may be," (§ 31,) satisfies the statute, and nothing but the statement of that fact is necessary to show that such service of the notice is not certain to reach all named respondents. The service by mail may be made at any time within seven days after publication in the newspaper. The mail is a good messenger to carry a communication to one whose identity and exact address are known, as is the case where one writes to another with whom he is in regular correspondence, but it is not a good messenger to use in conveying notice to strangers whose identity and address are not necessarily known, and must be ascertained *pro hac vice;* this is recognized in the act when it provides that the notice is to be mailed, not to all respondents named in the notice, but to "every person named therein whose address is known." § 32. Had the provisions required the notice to be mailed to every one named, the practical result would probably have been the same; for the recorder has no means of knowing the identity and proper address of each respondent, and the provision that the affidavit of the recorder in the matter of mailing copies of the notice shall be conclusive, takes away from the applicant any temptation to use extraordinary diligence in furnishing to the recorder the exact name and address of those whose interest it will be, if brought in, to defeat the object which he seeks to obtain by bringing his application.

More than that, the mail was originally devised as a means

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of transmitting messages in business and social life, and not of serving notices of proceedings which may divest one of his property, and it has heretofore been treated as such by the public. A man not in business may reasonably absent himself from the Commonwealth in travelling for pleasure, and direct that all communications addressed to him shall be forwarded to him at specified places where he expects to go, but where he later decides that it is not his pleasure to go; it is probably within the experience of every one that many letters so forwarded are never received.

But the decisive objection to the provisions of the act as to notice to named respondents lies deeper than considerations of this nature alone; and it does not depend upon the question whether service by mail is as likely to reach the respondent as service at the defendant's last and usual place of abode, as the opinion would seem to assume.

Each and every statute of Massachusetts, whether passed in the time of the Colony, the Province, or the Commonwealth, authorizing a judgment on default based on any but personal service, has given to the defendant, who did not in fact have notice of the proceedings, and therefore no opportunity to be heard before the judgment was rendered, a right to have the judgment vacated on a writ of review. "Such judgments in this State are treated as valid until reversed, for the reason that the parties have an adequate remedy by review or writ of error." Wells, J., in *Salem* v. *Eastern Railroad*, 98 Mass. 431, 448.

It is definitely settled in other connections, that a right of appeal, or a right to a review, is sufficient to render constitutional a judgment, which, but for the right to that appeal or review, would be void, as not securing to the defendant the rights guaranteed to him by the Constitution. *Jones* v. *Robbins*, 8 Gray, 329. *Holmes* v. *Hunt*, 122 Mass. 505, 516. *Foster* v. *Morse*, 132 Mass. 354.

The first statute in Massachusetts authorizing a judgment on default on any but personal service was the Colony Act of 1644. That act provided that in case property of the defendant was attached, the notice, or, as it is now termed, the separate summons, might be served upon the defendant by leaving the same "at his house or place of usual abode," with a proviso that if

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the defendant was at the time of service out of the jurisdiction, the case should be continued for a term before execution issued; and no execution should then issue until the plaintiff gave security to respond to the defendant "if he shall reverse the judgment within one year, or such further time as the court shall permit." Anc. Chart. 50. It is a fact of some interest that this is the origin in this Commonwealth of writs of review; and in this connection it is of no little importance that the origin of writs of review was to give to defendants who, being served under the statute and being absent from the colony at the time of service, did not know of the proceedings, an opportunity to have the judgment made in their absence vacated, if they had a good defence to the original claim.

This provision was re-enacted in 1700–1701 without substantial change, and was then extended to writs of dower and *scire facias;* it was then provided in the interest of the absent defendant that "no real estate taken in execution granted upon such first judgment shall be alienated or past away until after the expiration of the said twelve months, or after a new tryal brought within the said space of twelve months, to the intent that restitution thereof may be made in case as aforesaid." Prov. St. 1700–1701, c. 20; 1 Prov. Laws, (State ed.) 447, 448.

In 1726 the provisions of the original act were extended to the service of a capias when no attachment was made, and in 1797 to writs of ejectment, error, review, to real actions, and generally to all civil actions, "wherein the law does not require a separate summons to be left with the defendant." St. 1797, c. 50, §§ 1–5. The provisions of this act have since been re-enacted without substantial change until this day. Rev. Sts. c. 90, §§ 41, 45, 48; c. 92, §§ 3, 4, 6, 8; c. 99, § 17. Gen. Sts. c. 123, §§ 25, 28; c. 126, §§ 6–8, 10; c. 146, § 20. Pub. Sts. c. 161, §§ 31, 34; c. 164, §§ 6, 8, 10; c. 187, § 21.

This right of review had been previously extended to judgments rendered by justices of the peace and all inferior courts. St. 1791, c. 17, § 3; re-enacted in Rev. Sts. c. 99, § 27. Gen. Sts. c. 146, § 24. Pub. Sts. c. 187, § 25.

In 1820 the right to review a judgment was enlarged by giving the court power to issue a writ of review, even if the defendant was within the Commonwealth at the time of service at his

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last and usual place of abode, provided he did not in fact have notice of the action, and applied for a review within a year after he first heard of it. St. 1820, c. 53. *James* v. *Townsend*, 104 Mass. 367. This act was re-enacted in Rev. Sts. c. 92, § 5; c. 99, §§ 18–20. Gen. Sts. c. 146, § 21. Pub. Sts. c. 187, § 22.

The Revised Statutes made a further provision in protection of the rights of a defendant in a real action who had not been personally served and against whom judgment had been rendered on a default in his absence, to wit, that if the judgment were reversed within a year the land should be restored. Rev. Sts. c. 92, § 9.

Without going more particularly into the statutes, it is enough to say that it has always been held in this Commonwealth that a judgment rendered on a default is binding on the defendant when service was made upon him personally. *Matthewson* v. *Moulton*, 135 Mass. 122. But if service was made at his last place of abode, or in any way other than by personal service, and he did not in fact have notice of the proceeding, it is not binding upon him. If provision for reopening the judgment is made by review or writ of error, his remedy is to have the judgment vacated by such a proceeding instituted directly for that purpose. *Hendrick* v. *Whittemore*, 105 Mass. 23. *Finneran* v. *Leonard*, 7 Allen, 54. If, however, the proceeding is not according to common law, so that error does not lie, the judgment may be attacked collaterally, and shown to be void for want of notice when invoked against the defendant. *Smith* v. *Rice*, 11 Mass. 507, 514. *Cook* v. *Darling*, 18 Pick. 393. Or if a judgment is rendered in another State against a citizen of this State, or in this State against a citizen of another State, it may be so attacked collaterally when suit is brought on it, because to compel him to have the judgment vacated by a writ of error, in which he must file a bond if he would obtain a stay of execution, is to impose a burden not warranted by the Fourteenth Amendment to the Constitution of the United States. *Needham* v. *Thayer*, 147 Mass. 536. And on this point generally see the exhaustive opinion of Judge Wells in *Salem* v. *Eastern Railroad*, 98 Mass. 431.

This doctrine that a defendant is not bound by a judgment rendered on default in his absence, based on a service other than personal service, is not peculiar to Massachusetts, but is of uni-

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versal application; there is a difference in some States as to the remedy. In some jurisdictions the judgment will not be vacated if the defendant failed to receive notice through a false return of the sheriff, or an unauthorized appearance was made by an attorney, unless a suit on the sheriff's bond, or a suit against the attorney, fails in fact to give him an adequate remedy. *Walker* v. *Robbins*, 14 How. 584. In Connecticut a bill in equity lies to enjoin the enforcement of a judgment so obtained, though no fraud can be imputed to the plaintiff if the time prescribed by statute for vacating the judgment has expired. *Jeffery* v. *Fitch*, 46 Conn. 601. In New York it has been held that even after the time prescribed by statute for vacating such a judgment has expired, the court has inherent power to set it aside if made in the absence of the defendant. *Vilas* v. *Plattsburgh & Montreal Railroad*, 123 N. Y. 440. And there are cases in the Supreme Court of the United States, and in this Commonwealth, indicating that judgments may be vacated after the term by exercise of the court's inherent power independently of statute. *Ex parte Crenshaw*, 15 Pet. 119. *Waters* v. *Stickney*, 12 Allen, 1. *Gale* v. *Nickerson*, 144 Mass. 415. *Stickney* v. *Davis*, 17 Pick. 169.

But these cases all agree in this, that the judgment is not binding, certainly in the absence of an adequate remedy against the sheriff or the attorney who wrongfully appeared, and differ only as to what the remedy is. To that effect see Freem. Judgments, (4th ed.) § 98, where many cases are collected.

It comes therefore to this: whatever service other than personal service has been heretofore allowed, a judgment rendered in the absence of the defendant, so served, has never been held to be final, that is, not subject to be directly reviewed or collaterally attacked; but it has always been held that a defendant is entitled to escape from such a judgment in some way, either by a proceeding instituted directly to vacate it, or by attacking it collaterally when it is sought to be enforced against him. In other words, it has always been held that he shall have an opportunity to be heard after the judgment on the merits of the original claim, if he did not in fact have an opportunity to be heard before the judgment was rendered.

The state of the common law in this connection at the time

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when the first settlers came to this country confirms this conclusion. At that time no such thing was known as a judgment against a defendant before he entered an appearance in court, even if he had been personally served with process. *Salem* v. *Eastern Railroad*, 98 Mass. 431, 451. *James* v. *Townsend*, 104 Mass. 367, 372. Story, J., in *Picquet* v. *Swan*, 5 Mason, 35, 48. At common law, if the defendant failed to obey the summons served on him, whether by personal service or by service at his house, or in real actions by posting notice on his land, the plaintiff's remedy was, where the injury was not accompanied by force, to take out a writ or writs of judgment or *pone*, followed by writs of *distringas*, under which the property of the defendant was distrained to compel his appearance in court, and when all his property had been distrained for that purpose the power of the court was exhausted; in those cases where the injury was accompanied by force the remedy of the plaintiff was to take out a capias under which the defendant might be arrested; and, if he secreted himself so that he could not be taken, a series of writs could be taken out which resulted in his being declared an outlaw, at which point the power of the court was at an end. 3 Bl. Com. 279, 287. It was not until 1725, and by force of St. 12 Geo. I. c. 29, that judgment at law could be taken by default for non-appearance of the defendant; it is of interest to note that personal service of the writ was required by St. 12 Geo. I. c. 29, to enable the plaintiff to take judgment by default.

It appears that at that time courts of equity did enter a decree taking the bill *pro confesso;* but this was done only if the service of the subpœna had been made on the defendant personally, and had been followed by successive processes of contempt, including sequestration. 3 Bl. Com. 444. It was not until 1732, and by force of St. 5 Geo. II. c. 25, that a decree taking the bill *pro confesso* could be entered unless the subpœna had been personally served, and then only on proof that the defendant had absconded to avoid service.

The principle that a defendant has the right to be heard on review of a judgment, if he did not have notice of the proceedings before judgment, is nothing more than the application to judgments rendered on a default based on service not personal, of the fundamental doctrine of the common law, which obtains

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in England as well as in America, that no judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be heard. "It is an essential principle of natural justice, that every man have an opportunity to be heard in a court of law, upon every question involving his rights or interests, before he is affected by any juridical decision of the question." *Commonwealth* v. *Cambridge*, 4 Mass. 627. To the same effect, see Wells, J., in *Salem* v. *Eastern Railroad*, 98 Mass. 431, 447, 450; Devens, J., in *Shores* v. *Hooper*, 153 Mass. 228, 230, 231. "In our courts of law, you cannot obtain a judgment against a party, without entering an appearance for him, so that it shall seem as if he had appeared. He either does actually appear, or else you enter an appearance for him, according to the act of Parliament expressly made for that purpose; and made because it is considered an invariable maxim of law, that you cannot proceed against a party without his having the opportunity of being heard, and without his appearing in court, before a judgment shall be pronounced against him." Bayley, B., in *Capel* v. *Child*, 2 Cr. & Jerv. 558, 579. See to the same effect Parke, B., in *Bonaker* v. *Evans*, 16 Q. B. 162, 171, 172, where many authorities are cited.

In the light of the well established general principle, that no judgment can be rendered against a man until he has in fact had an opportunity to be heard, and the equally well established application of that general principle, that a defendant has the right to be heard in review of a judgment rendered under a statute authorizing judgment against him to be entered in his absence, if he did not in fact have notice of the proceedings before the judgment was rendered, which principle has obtained since the first statute authorizing service of process at the last and usual place of abode of the defendant, and was a component part of that act, and which has been universally observed since then, the constitutional provisions in question must be construed to guarantee to every citizen the right to be heard before judgment against him becomes irrevocable; and if the judgment on default is based on any service of process, other than personal service on the defendant, provision must be made giving to a defendant, who did not in fact have notice of the proceeding before judgment, an opportunity afterwards to have it reversed or to attack

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it collaterally, when it is set up against him. This act does not secure to those named in the application and notice as claiming adverse interests their constitutional right to be heard, and is, in my opinion, for that reason, unconstitutional and void.

But if personal service upon those named as defendants in the application and notice had been required, the act would have been unconstitutional and void because it undertakes to conclude those having an adverse interest, whether residents or non-residents, who are alleged not to be known to the applicant or the examiner, without making them parties defendant by name; the act provides that, though they be not named in the application or in the notice, they are made parties defendant by the insertion in the notice of the words "to all whom it may concern," and their rights are extinguished by their non-appearance in answer to that notice.

It is a principle of our jurisprudence, brought to this country by our ancestors and recognized here since then, that no person is barred by judgment or decree in judicial proceedings according to the course of the common law, in which the plaintiff asserts rights of property adverse to his, unless he is named as a party defendant.

I have already shown that every defendant named must have notice of the proceeding before he can be finally and irrevocably concluded thereby; the complement of that rule which, together with it, makes up the full measure of the vested rights of property in this connection guaranteed to each citizen by the Constitution, is the rule now under consideration, that no person is barred by a judgment or decree in a proceeding the effect of which is to strip him of vested rights of property, unless he is named as a defendant.

No principle could be introduced more dangerous to vested rights of property than the principle that this rule can be dispensed with in the discretion of the Legislature. If this rule is dispensed with, no sufficient incentive is left to the plaintiff to name as parties defendant those who have adverse interests; that is to say, those whose interests, if they are brought in, will lead them to do all in their power to defeat the object which the plaintiff seeks to obtain by bringing his suit. The only possible way of insuring to those having adverse interests an oppor-

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tunity to be heard, is to require the plaintiff to name them as defendants under the penalty of their not being barred if not so named. If this penalty is removed, and a defendant is equally bound, whether named or not, there is not only no incentive to name as defendants those who claim an adverse interest, but the law has thereby offered to the plaintiff the greatest temptation not to name an adverse claimant if known, and not to use any diligence whatever to discover whether there are in fact persons who claim an interest adverse to his.

The effect of a judgment on a writ of right and of a fine, mentioned in the opinion, are not instances conflicting with the universality of the proposition that no person not named therein can be barred by a judicial proceeding. In those cases the world was barred, including all claiming an adverse interest though not named in the proceeding. But that was the effect of the lapse of the year and the day; they were not barred by the judgment apart from the lapse of time; they were barred by the lapse of time after a judgment. In other words, the judgment was sufficient to start the running of time against them, and they are barred by the operation of the principle of the statute of limitations.

The reference made in the opinion of the majority of the court to the statute of limitations makes it necessary to state in passing that the registration act cannot be supported on the grounds on which the statute of limitations quiets titles against all the world, or on any grounds deducible therefrom. It is unquestionably within the constitutional power of the Legislature to quiet the title to property by a statute of limitations. The principle of such a statute is that one, who is dispossessed of his property, must assert his ownership thereto by action within a specified time or be barred thereof; that is to say, cease to be such owner. But no statute was ever passed providing that an owner in possession of his property could be dispossessed thereof by any lapse of time, and no principle is deducible from the statute of limitations, which can justify such a statute, or a statute providing that, without naming him as a defendant, or without giving him notice, a court can by decree alone, unaided by the subsequent lapse of time, transfer his property to another.

But the main ground on which this provision of the act is

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sought to be upheld is that of necessity. It is said, "If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world is hardly possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims — indeed certainty against the unknown may be said to be its chief end — and unknown claims cannot be dealt with by personal service upon the claimants." See p. 73. It is undoubtedly true that the chief end of a proceeding to clear titles is to get rid of the unknown, and that an unknown claim cannot be dealt with by bringing notice of the proceeding home to the claimant; and it is true that it follows from that that a title cannot be cleared by a judicial proceeding unaided by the lapse of time. But it does not follow that titles cannot be cleared. The lapse of time has been the means and the only means heretofore used under our jurisprudence to clear titles against unknown claimants; under our Constitution it is, in my opinion, the only means available therefor. But it is of importance that it is available, and therefore that the argument of necessity fails. It would be within the constitutional power of the Legislature to enact, that the effect of some such decree as is provided for in this act, when properly proclaimed and served, should have the effect to put the claimant in possession of the title so set up, and that if that possession continued unbroken, and the decree setting up the applicant's title remained in force unmodified, for a specified time, all the world should be barred; if the opinion of the Supreme Court of Illinois in this connection (*People* v. *Simon*, 176 Ill. 165, 177, 178) is not to be construed as confined to the particular provisions of that act, it cannot be supported.

Such a requirement would practically enable any person to protect his rights of property by an examination of the records of the Court of Registration made during the specified term, while under this act it is beyond the power of a person to protect his property from the effect of a decree not subject to be reopened, and made in his absence without his knowledge. If he have an estate less than the fee, he can protect himself neither by registering his own title nor by an inspection of the records of the court. He can do nothing but trust to the chance that the applicant and the examiner may exercise sufficient care to discover his claim, will learn his true name and address, and

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that if his claim is discovered and the notice is properly addressed and mailed, it will reach him in time to enable him to appear in court before a decree has been rendered in his absence, which is beyond the power of any court to change when once it has been made. And if his original title is by prescription, he must trust to the intelligence and good faith of the applicant alone, for the examiner will not in his examination learn of such a title.

But there is an even more decisive answer to the argument of necessity, and that is this. The constitutional provision securing to the owner the right not to be deprived of his property except by due process of law, speaks to each citizen directly and personally. It is no answer when a person complains that he had no notice of the proceeding, in which the decree was made transferring his property to another, to say to him that ninety-nine other persons had notice, and that in ninety-nine cases out of a hundred a person would have notice. This provision is not a glittering generality to be explained away in any such manner to a man whose property has been divested by a decree made in his absence. It is a constitutional guarantee to each citizen; and no citizen can be deprived of the security given by the Constitution to his rights of property by any counterbalancing of the benefits derived by the multitude against the evil suffered by him; it is a constitutional guarantee to each citizen that his property shall not be transferred by the judgment of a court to another without his having had in fact an opportunity to be heard, no matter what the consequences may be. If it means anything short of that, it is not a constitutional guarantee; it is but a rule which may mean something or nothing, as the Legislature in its discretion may decide.

Moreover, this is a constitutional guarantee made to each and every citizen equally and alike. It is no fault of a person residing in the Commonwealth, who has an estate in the land covered by the application, that the applicant and the examiner did not know of his claim, if they did not know of it; much less if they allege that they did not know of it, when by the exercise of due care they would have known of it. It is strange, indeed, if a discrimination can be made between two residents within the Commonwealth, as to their constitutional right to be heard

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before an irrevocable judgment is made concluding their rights of property; and that that discrimination should finally depend on the negligence and good faith of their opponent, the applicant, and of the court examiner, and, as has been shown, in case of titles by prescription, on that of the applicant alone. And yet that is the conclusion to which the court has come; by the opinion of the court, the negligence of the applicant, in not discovering the claim of a resident to an interest in the land in question, precludes him from having the same right to be heard in defence of his rights of property in that land which his neighbor has, whose claim was discovered; in the first case he is not named as a defendant, and that service of process which is required in actions *in personam* need not be made on him; in the latter case the defendant is not barred unless such service of process as is required by actions *in personam* has been made.

There is no precedent for holding that the rights of persons not named as defendants are barred in any proceeding other than a proceeding *in rem*, and, for the reasons which I have given, I am of opinion that the constitutional rights of property guaranteed to each and every citizen equally and alike, require that that rule should not be abrogated.

To conclude this part of the discussion, I am of opinion that unless the proceeding under the registration act is to be supported as a proceeding *in rem*, it is without precedent, and is contrary to the rule heretofore universally recognized without any exception wherever the common law of England prevails, that no party is barred unless he in fact had an opportunity to be heard; *Commonwealth* v. *Cambridge*, 4 Mass. 627; *Salem* v. *Eastern Railroad*, 98 Mass. 431; *Shores* v. *Hooper*, 153 Mass. 228, 230; *Capel* v. *Child*, 2 Cr. & J. 558; *Bonaker* v. *Evans*, 16 Q. B. 162; and I am of opinion that (unless the application is a proceeding *in rem*) a decree under that act, so far as it affects either the rights of defendants named and not personally served, or absent persons not named, is not due process of law.

I come now to the consideration of the constitutionality of the act as a proceeding *in rem*.

The act professes to be drawn on the theory that it authorizes a proceeding *in rem*, and it is plain that the service of the notice prescribed was taken from that used in proceedings in the Pro-

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bate Courts; it is also plain that there was no attempt to secure a compliance with the requirements of an action *in personam*, either with respect to the service to be made upon those named as defendants, or to the necessity of joining as parties defendant all whom the plaintiff wished to have concluded by the decree.

Petitions for probate of a will afford no ground for holding that the application under the act is a proceeding *in rem*. Where there is a fund in court for distribution, such as the proceeds of a bankrupt estate or of the property of an insolvent corporation, which is in process of being wound up, a general notice to whom it may concern served by publication is sufficient to give the court jurisdiction; and it is sufficient because in such cases the object of the proceeding is not to divest an owner of a title which he has, but to entitle him to share in the fund by proving his right; petitions for the probate of a will (*Bonnemort* v. *Gill*, 167 Mass. 338) and inquests of office to establish an escheat (*Hamilton* v. *Brown*, 161 U. S. 256) belong to this class. No rights of property guaranteed by the Constitution have vested in the heir which the probate of the will or the inquest of office divests; the purpose of such proceedings is to ascertain whether such rights shall or shall not vest in the heir. *Hamilton* v. *Brown*, 161 U. S. 256, 268.

More than that, it has never been decided that a decree admitting a will to probate was binding on all the world, or that a statute could be constitutionally passed making it binding on all the world. In *Bonnemort* v. *Gill*, the only point decided was that notice by publication gave the court jurisdiction to proceed with the petition for probate of the will, but it is perfectly well settled that the decree of the Probate Court in that proceeding can be vacated on application at any time. *Waters* v. *Stickney*, 12 Allen, 1. *Gale* v. *Nickerson*, 144 Mass. 415. In *Hamilton* v. *Brown*, 161 U. S. 256, it was decided that a statute of Texas was not in violation of the Fourteenth Amendment, which made the decree of escheat therein provided for binding on all the world after notice similar to that provided for by the registration act under discussion. This statute did not go so far as the registration act; the statute directed that the land covered by the decree of escheat should be sold, and provided that the proceeds of the sale should be paid to any person

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who should subsequently prove himself to be the heir. Pasch. Dig. art. 3671. *Hamilton* v. *Brown*, 161 U. S. 256, 264. That fact was mentioned in the opinion, but does not seem to have been relied upon. The opinion lays down the broad proposition that the decree of escheat is conclusive on the ground that "if such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the State, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law." *Hamilton* v. *Brown*, 161 U. S. 256, 275, so far as that reasoning goes, is open to the criticism (1) that the right of succession among private persons in the ordinary administration of estates is not finally determined by a decree of the Probate Court; such a decree can be vacated at any time; *Waters* v. *Stickney*, 12 Allen, 1; *Gale* v. *Nickerson*, 144 Mass. 415; and (2) that the right of succession as between all persons and the State is not finally determined by an inquest of office; office found in favor of the king did not result in a judgment binding on all the world, it merely entitled him to the possession of the *res;* it did not determine as against the world his, or anybody's, right of property in the *res;* 3 Bl. Com. 259, 260; but the true owner could "avoid the possession of the crown acquired by the finding of such office" by petition of right disclosing new facts not found by the office, or by his *monstrans de droit* relying on the facts as found, or by traversing the facts found in favor of the king on leave obtained from the Court of Chancery under its common law jurisdiction and from the Petty Bag. Stuart, V. C., in *In re Parry*, L. R. 2 Eq. 95, 97. 3 Bl. Com. 258. *Ex parte Webster*, 6 Ves. 809. *Ex parte Gwydir*, 4 Madd. 281. 16 Vin. Abr. 86, pl. 1.

Blackstone's qualification (3 Bl. Com. 260) that an owner has "for the most part" a right to traverse the facts is inaccurate; and it is true, as I have stated, that the owner has the right in every case to traverse the facts found by the inquisition. It appears from an inspection of Sir Henry Finch's Discourse on Law, 324, which Blackstone cites for the qualification, that if

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the office was found for the king on a judgment of another court, whereby the owner was attainted of treason, he could not attack that judgment collaterally in a traverse to the inquisition; that in no way qualifies the right of a person to traverse the facts established by office found alone. So far, therefore, as the decision in *Hamilton* v. *Brown* rests on the analogy of a final determination of the right of succession among private persons or between all persons and the State, it cannot be supported. But the decision was also put on the further ground that "when a man dies, the Legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite time." This statement in the opinion, taken in connection with the provision of the statute, that the petition to have the escheat established could only be filed "when no letters testamentary or of administration appear to have been granted" in the county where his estate would be administered, (Pasch. Dig. art. 3658, *Hamilton* v. *Brown*, 161 U. S. 256, 265,) puts the case on the same footing as a fund in court, especially when it was stated in an earlier part of the opinion that "the whole object in proceedings for escheat, as in proceedings of administration, is to ascertain who are entitled to the estate of a deceased person." *Hamilton* v. *Brown*, 161 U. S. 256, 268. When one dies seised of land and no administration is taken out on his estate, it is plain that his estate is in the same position as a fund in court; the estate must be handed over to somebody; a general notice to all to come in and prove their right is sufficient, especially as the only practical effect is to change the land into money, it being expressly provided that any one entitled to the land shall be entitled on application to the proceeds derived by the State from the sale thereof. Anything short of that might well result in large tracts of land, in such a State as Texas, remaining vacant to the detriment of the public welfare. In the petition for escheat in *Hamilton* v. *Brown* it is alleged that on the death of Hamilton, who died seised, "there are no tenants upon said tract of land, and no person is either in actual or constructive possession of said tract of land or any part thereof, nor is there any person, claiming the estate in and to said tract of land, known to petitioner." 161 U. S. 256, 258. There is nothing, therefore, in petitions for probate of a will or to establish

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an escheat, which justifies an application under this act as a proceeding *in rem*.

The analogy of a libel *in rem* in admiralty is the analogy which has been most pressed as justifying this as a proceeding *in rem*, and the general proposition is laid down that if all the world are barred the proceeding is a proceeding *in rem*.

But the test whether particular proceedings are, or are not, proceedings *in rem*, depends upon whether they "are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable." Field, J., in *Freeman* v. *Alderson*, 119 U. S. 185, 187; to the same effect see Miller, J., in *The Hine* v. *Trevor*, 4 Wall. 555, 571.

That this is the true test of whether a particular proceeding is or is not a proceeding *in rem* is shown by the admiralty rule as to possessory and petitory libels. If the purpose of the libel is the ascertainment of title or delivery of possession of a ship, or if the libel is filed to obtain security for the return of the ship from a voyage undertaken without the consent of the libellant being a part owner, a libel *in rem* does not lie; the libellant must make the owner a party and make service upon him as in an action *in personam* at law. Benedict's Admiralty Practice, § 395. Henry, Admiralty Jurisdiction & Procedure, § 29. There is therefore no authority to be found in admiralty for a proceeding *in rem*, where the purpose of the proceeding is the ascertainment and establishment of the plaintiff's title in the *res*.

Whether a particular proceeding is or is not a proceeding *in rem* depends upon the character of the right in the *res* sought to be enforced, which is given by rules of substantive law, when the purpose of the proceeding is to enforce a right of property and not to find an owner for property *in custodia legis*, as in case of a fund in court, the probate of a will, or an escheat for lack of heirs. It does not depend upon the fact that the plaintiff undertakes to enforce an ordinary right of property in the *res* against all the world; the test is not, are all the world barred,

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but it is: Is it a proceeding to enforce a liability for which the *res* is liable irrespective of who owns it — such a liability that the *res* can be properly impleaded as the respondent who is liable? If it is, then a proceeding *in rem* lies, and all the world are barred; but if it is not such a proceeding, and is a proceeding to enforce an ordinary right of lien or of property only, the proceeding is not in its nature a proceeding *in rem*, and the Legislature cannot make it so by providing that all the world shall be barred. To say that the test of a proceeding *in rem* is the fact that all the world are barred, is to confuse cause and effect.

The only proceeding *in rem* known to the common law was an inquest of office, already referred to in connection with *Hamilton* v. *Brown*, 161 U. S. 256, "which is an inquiry made . . . concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels," (3 Bl. Com. 258,) such as an attainder for treason, whereby the guilty party's property was forfeited to the king, or dying without heirs, whereby his lands escheated to the king; it also was the proper remedy to give the king possession of chattels, as in case of wreck, treasure trove, and the like, and forfeitures for offences, as, for example, the forfeiture of the property of a *felo de se*. 3 Bl. Com. 258, 259.

Forfeiture of lands was, by the Body of Liberties of 1641, Art. 10, declared not to exist in the Colony of Massachusetts, (*Commonwealth* v. *Mink*, 123 Mass. 422, 425, 426,) and most of the other prerogatives of the king mentioned by Blackstone never obtained here; but the principle of such inquests has been followed in case of forfeitures for offences, and there are several instances where the Legislature has declared that personal property should be forfeited if used illegally, and in such cases has properly provided for a proceeding *in rem* against it; familiar examples of this are to be found in Pub. Sts. c. 212, and in Pub. Sts. c. 100, §§ 30–39, providing that certain personal property used in violation of law, including implements used in gaming, and liquor kept for sale in violation of the statute, should be liable to be condemned; and many cases of proceedings *in rem* under those acts are to be found in the reports. A very instructive opinion in this connection by the present Chief Justice is to be found in *Commonwealth* v. *Intoxicating Liquors*, 163 Mass. 42. See also *Attorney General* v. *Justices of Municipal Court*, 103 Mass. 456; *Commonwealth* v. *Gaming Implements*, 119 Mass. 332.

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Where the purpose of the proceeding is neither to find an owner for property *in custodia legis*, nor to enforce a right of such a nature that the *res* itself is properly impleaded as the responsible defendant, but the purpose of the proceeding is to deal with some one's right of property therein, as in case of a possessory or petitory libel in admiralty, the action is not an action *in rem*, but an action *in personam*, (Field, J., in *Freeman* v. *Alderson*, 119 U. S. 185, 187, 188, 190,) and all parties to be concluded thereby must be named as parties defendant.

In stating that the test, and the only test, as to whether a particular proceeding is, or is not, a proceeding *in rem* is this, "Are all the world barred?" the Chief Justice tacitly recognizes that if this proceeding is upheld as a proceeding *in rem*, it is within the constitutional power of the Legislature to provide that any property within the territorial limits of the Commonwealth, real or personal, corporeal or incorporeal, may be recovered, or any title therein or lien thereto established, in a proceeding in which no defendant need be named and no notice need be given except notice by publication; if in this proceeding the Legislature can change the constitutional right to be heard by authorizing a proceeding *in rem*, it may authorize a proceeding *in rem* in any case involving property, and upon its doing so all the rest follows. There is no escape from that conclusion. There is nothing peculiar to this proceeding; it is a proceeding which may be maintained by any person whether in or out of possession of land to establish the title which he claims thereto.

For the purposes of decision the choice lies between the view which I have set forth on the one hand, and on the other hand holding the doctrine that it is within the constitutional power of the Legislature, by changing the form of the proceeding from an action *in personam* to an action *in rem*, to avoid the necessity of complying with the requirements of an action *in personam* in those cases in which, under the constitutional requirements of due process of law, it has heretofore been necessary to name as parties defendant all persons, who are to be concluded by the judgment or decree, and to give to them actual notice of the pending proceedings, and an opportunity to be heard before a judgment, which is final and is not subject to be reviewed or attacked, can be rendered against them.

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I will now consider the authorities and points principally relied on by the Attorney General, which I have not yet disposed of. The Attorney General seems to place his main reliance (1) on the statutes as to partition and the cases of *Cook* v. *Allen*, 2 Mass. 462, 470, *Dascomb* v. *Davis*, 5 Met. 335, and *Foster* v. *Abbott*, 8 Met. 596, which have arisen in Massachusetts under them; and (2) on the three cases of *Belcher* v. *Mhoon*, 47 Miss. 613, *Sullivant* v. *Weaver*, 10 Ohio, 275, and *Shepherd* v. *Ware*, 46 Minn. 174.

There is nothing in the statutes as to partition, or in the cases arising under them, to conflict with the conclusion to which I have come.

It will not be necessary to consider the statutes prior to the Revised Statutes. Prov. St. 1742–43, c. 24; 3 Prov. Laws, (State ed.) 42. St. 1783, c. 41. St. 1786, c. 53. Prior to the Revised Statutes, the act did not undertake to deal with rights of property, either finally or *prima facie;* it dealt only with the right of possession, without regard to the right of an owner to enforce his right of property in a writ of right. *Dascomb* v. *Davis*, 5 Met. 335, 340. *Cook* v. *Allen*, 2 Mass. 470. Report of Commissioners on Revised Statutes, c. 103, note to § 30. By reason of the abolition in the Revised Statutes of the writ of right, the judgment on a petition for partition became equivalent to a judgment on a writ of entry, and it became necessary to protect the rights of property of those who were parties to the partition proceedings, whether they appeared or not; and the provisions, which were enacted in Rev. Sts. c. 103, §§ 33–47, were drafted by the commissioners for that purpose. It was provided that if two persons claimed to be entitled to a particular share, the court admitted one of them to act for that share in respect to the partition, and the assignment of land to that share was binding upon the owner thereof, whoever he might be, Rev. Sts. c. 103, § 41; but he was not concluded as to the ownership of the share so assigned, §§ 40–42; and if one claiming to be the owner of a share did not appear in the partition proceedings, he was bound by the assignment of land made to the share claimed by him, but could recover the land so assigned in a suit brought for that purpose, §§ 39, 40; if one who did not appear claimed to be part owner with another of a

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share, which was assigned to that other, he was bound by the assignment of land to the share, but could recover his part of the land so assigned, § 43; if one who did not appear claimed to own in severalty any part of the land divided, he was not bound by the partition proceedings, but could recover his land as if no partition proceedings had been had, § 38; if any person to whom land had been assigned was evicted, he could have a partition of the residue of the original land, § 46; and finally, if any part owner at the time of the partition was out of the State, he was not bound by the partition made, but could within three years after final judgment have a new partition, (§§ 34–36,) and full right of review by appeal and a writ of error could be had to any judgment, §§ 31, 32. *Foster* v. *Abbott*, 8 Met. 596, 599. As to the scope of the act, see Commissioners' Report on the Revised Statutes, c. 103, notes to §§ 36–40, §§ 40, 41, 42, 43, and Pub. Sts. c. 178, §§ 35–44.

Neither *Belcher* v. *Mhoon*, 47 Miss. 613, nor *Sullivant* v. *Weaver*, 10 Ohio, 275, are cases of much original importance, and in each State there are subsequent decisions under which the land registration act under discussion is unconstitutional. *Brown* v. *Levee Commissioners*, 50 Miss. 468. *State* v. *Guilbert*, 56 Ohio St. 575.

In *Belcher* v. *Mhoon*, the question of the constitutionality of the act was neither raised by counsel nor passed upon by the court. From the obscure report of *Sullivant* v. *Weaver*, it would seem to have been held in that case that a decree in equity, founded on process issued against the heirs of a specified decedent, was evidence in proving a chain of title. The sole question in the case was whether the plaintiff had made out a *prima facie* case of title in himself; the constitutional question under discussion was not raised. It was objected in argument that the decree could not be collaterally attacked, and there was no suggestion that the defendant was an heir of the decedent.

Shepherd v. *Ware*, 46 Minn. 174, is an authority for the constitutionality of an act providing that, in an action to quiet title, unknown persons are bound by a notice to all the world, served by publication; but even that decision is no authority for this act; in that case any interested party had a year after judgment to appear and have it vacated. It is expressly stated in the opinion that the statute gave to such unnamed persons "the same right

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to appear and defend before and after judgment" that was given to named defendants who were served by publication; and it appears by Sts. of Minn. 1894, § 5206, that a defendant brought in by publication could within one year after judgment appear and have the judgment vacated if it was wrongly made. For reasons already given, I think that opinion goes too far, though it does not go so far as this act.

The doctrine of *Arndt* v. *Griggs*, 134 U. S. 316, and *Short* v. *Caldwell*, 155 Mass. 57, does not reach the question under discussion. No State is deprived of its power to deal with property within its limits by the absence of the owner; consequently it is within the power of a State, in case a suit is brought against the non-resident in which the plaintiff seeks to affect the estate of the defendant, but not to entitle himself to a personal charge against the defendant, to proceed against his estate after giving him such notice as the circumstances permit. See Miller, J., in *Huling* v. *Kaw Valley Railway & Improvement Co.* 130 U. S. 559, 563, 564. But if title to real estate can be established against unknown claimants in a proceeding in which they are not named, and where service is made by publication only, it must be supported on a principle which is different in kind from the doctrine of those cases.

It is true that several statutes have been enacted of recent years which undertake to conclude unknown and unnamed defendants. St. 1882, c. 237. St. 1885, c. 283. St. 1889, c. 442. St. 1893, c. 340. St. 1897, c. 522. The constitutionality of these acts in the connection now under discussion has never been brought before the court; in *Short* v. *Caldwell*, 155 Mass. 57, the only objection raised was a lack of jurisdiction by reason of the non-residence of the claimants who appeared; in *Loring* v. *Hildreth*, 170 Mass. 328, the only constitutional objection set up was that constructive service cannot reach unborn parties, represented in fact by a guardian *ad litem*. It was conceded in argument that there might be constructive service on unknown persons (p. 329), and that was not considered by the court. How far these statutes are void is not now before the court; whether effect can be given to a decree under St. 1889, c. 442, and St. 1897, c. 522, when unascertained parties are before the court by a guardian, (as in *Loring* v. *Hildreth*, *ubi supra*,) or a

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decree against unnamed parties under St. 1897, c. 522, can be supported as being against members of a class sufficiently represented in court, need not now be considered.

The conclusion which I have reached is in the main supported by *Webster* v. *Reid*, 11 How. 437; *State* v. *Guilbert*, 56 Ohio St. 575; *Brown* v. *Levee Commissioners*, 50 Miss. 468; *People* v. *Simon*, 176 Ill. 165.

In the words of Chief Justice Coke: "When authority and precedent is wanting there is need of great consideration, before that anything of novelty shall be established, and to provide that this be not against the law of the land." 12 Co. 75.

I am authorized to state that Mr. Justice LATHROP concurs in this dissent.

FRANK W. BRIGHTMAN *vs.* LOT B. BATES.
SAME *vs.* JAMES E. DWIGHT.

Bristol. October 23, 1899. — January 3, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Covenant — Acceptance — Corporation — Syndicate Agreement — Pooling Contract.

A covenant executed by the defendants and delivered to the plaintiff recited that a certain number of shares of the stock of a corporation had been or were about to be purchased by a syndicate under an agreement of a certain date; that the plaintiff was largely instrumental in organizing the syndicate; and that "he considers that for his services therein in case the syndicate is formed, and the aforesaid shares purchased, he should receive for his compensation" a certain amount of stock. These recitals were followed by several covenants on the part of the defendants and another to give the plaintiff in stock of the corporation at a certain price per share a commission of a certain sum a share "upon the number of shares of said stock we sell to said syndicate, less the number of shares we have severally subscribed as members of said syndicate," and certain other deductions, in case the compensation was not got from the syndicate. *Held*, that the covenant properly might be found, if not ruled, to be made to the plaintiff; that beyond acceptance of the delivery to him no other acceptance or notice of acceptance was necessary; and that the contract was intelligible. *Held, also*, that it could not be said that the judge was not warranted in finding that whatever efforts to get the compensation from the syndicate were necessary before coming on the defendants had been made.

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A written agreement, whereby the subscribers recite their desire to become members of a syndicate to the end that control of a corporation and advantage to them may be gained, agree to take the shares set against their names at a certain price a share, and further agree after the purchase to enter into a pooling contract, whereby all the syndicate stock "shall be voted at each annual meeting for a period of not less than three years, for such board of directors as shall be named" by a committee of five of the subscribers, with power to a majority of them to fill any vacancy in the committee, is lawful.

TWO ACTIONS OF CONTRACT upon the following instrument, dated September 22, 1894, and executed by J. A. Beauvais and by the defendants respectively:

"Whereas, 1,360 shares in the capital stock of the Union Street Railway Company, in New Bedford, have been, or are about to be, under an agreement dated Sept. 4, 1894, taken and purchased by a syndicate composed of J. A. Beauvais, J. N. Beckley and others;

"And Whereas Frank W. Brightman of Fall River has been largely instrumental in organizing said syndicate, and he considers that for his services therein in case the syndicate is formed, and the aforesaid shares purchased, he should receive for his compensation the sum of ($5,000) five thousand dollars in the stock of said Company at $169 a share, at its present capitalization;

"Now, the said Frank W. Brightman agrees to use his best endeavors to obtain that compensation from the said syndicate as a whole, and the said J. A. Beauvais agrees to use his influence to secure to the said Brightman the aforesaid compensation. If the efforts of the said Brightman and the said Beauvais shall be unsuccessful, in that behalf, we whose names are hereto subscribed, agree, severally, to pay said Brightman, in stock of said Company, at $169 a share, a commission of $4 per share upon the number of shares of said stock we sell to said syndicate, less the number of shares we have severally subscribed as members of said syndicate, and less, also, on such shares as we, or either of us have assumed certain obligations to induce parties to become members of said syndicate. In case said Brightman should receive from said syndicate a part of said compensation, then the subscribers hereto are not to be required to contribute and pay the commission as above to said Brightman on more shares than will be sufficient to make up said sum of ($5,000) five thousand

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dollars; in which case, the proportionate part that they severally pay as members of the syndicate, shall be credited them in the proposed settlement as above set forth."

The material provisions of the agreement referred to in the above-named instrument were as follows:

"Whereas, 1,360 shares of the capital stock of the Union Street Railway Company, of New Bedford, Mass., can be purchased, out of a total capital stock of 2,600 shares, by the subscribers hereto at the price of $169 per share;

"And Whereas, the undersigned are desirous of becoming members of the syndicate for the purchase of such stock, to the end that thereby control may be obtained of said railway company and gain and advantage accrue to the several subscribers hereto;

"Now therefore, in consideration of the premises, and of one dollar paid by each of the subscribers hereto to the others, the receipt whereof is hereby acknowledged, we, whose names are hereunto subscribed, do severally agree to take, and, on demand, pay for the number of shares of stock of said railway company set opposite our respective names, at the price of $169 per share; and after the purchase of such stock to enter into a pooling contract under the provisions of which all such stock so purchased shall be voted at each annual meeting for a period of not less than three years, for such Board of Directors as shall be named by" five persons enumerated, "or a majority of them, with power granted to a majority of the persons so named, as pooling committee, to fill any vacancy which may occur from any cause in the membership of such committee.

"The payment of such stock to be made to J. A. Beauvais ten days after notice to the subscriber from him to the effect that the whole 1,360 shares of said stock proposed to be purchased has been subscribed for.

"Said J. A. Beauvais agrees to obtain and deliver to the several subscribers hereto the number of shares of said stock subscribed for by each of the signers hereof upon the payment to him of the purchase price of the same. This obligation is assumed, however, on the mutual understanding that the said J. A. Beauvais has now in his possession a majority of the said 1,360 shares, and that on a minority thereof he holds good and valid

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written contracts, from the owners thereof, for its sale and delivery to him, upon the payment to them of the said purchase price of $169 per share; and that he shall not be held personally responsible in respect to the delivery of the stock not in his possession except for the faithful enforcement of the written contracts he holds as aforesaid; and to which enforcement he pledges his best efforts.

"This contract shall not be binding upon any subscriber unless the whole number of 1,360 shares of stock has been hereto subscribed for, on or before the 5th day of October, 1894."

The cases were tried together in the Superior Court, without a jury, before *Hardy*, J., who found for the plaintiff in each case; and, at the request of the defendants, reported the cases for the determination of this court. The facts appear in the opinion.

L. LeB. Holmes, for the defendants.

H. M. Knowlton, for the plaintiff.

HOLMES, C. J. These are actions upon a covenant executed by the defendants. The covenant recites that 1,360 shares of the stock of the Union Street Railway Company in New Bedford have been or are about to be purchased by a syndicate, under an agreement of September 4, 1894, that the plaintiff has been largely instrumental in organizing the syndicate, and that "he considers that for his services therein in case the syndicate is formed, and the aforesaid shares purchased, he should receive for his compensation" a certain amount of stock. These recitals are followed by several covenants on the part of the defendants, and one other to give the plaintiff, in stock of the company at $169 a share, a commission of $4 a share "upon the number of shares of said stock we sell to said syndicate, less the number of shares we have severally subscribed as members of said syndicate," and certain other deductions, in case the compensation was not got from the syndicate. The judge before whom the case was tried found for the plaintiff, and the case is here upon a report of requests for rulings which in various forms raise the question whether such a finding can be justified in law.

Before going further we will dispose of one or two objections which were not the main ground of defence and were not much pressed. The covenant was delivered to the plaintiff, and prop-

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erly might be found, if not ruled to be made to him. Beyond acceptance of the delivery to him no other acceptance or notice of acceptance was necessary. The contract is intelligible. We cannot say that the judge was not warranted in finding that whatever efforts to get the compensation from the syndicate were necessary before coming on the defendants had been made. The 1,360 shares were subscribed for, and although some of the subscriptions were upon stipulations, that does not affect the case, because all the stock was taken and paid for before the action was brought. We pass to the principal defence.

The syndicate referred to was formed under another written agreement, whereby the subscribers recite their desire to become members of it to the end that control of the railway company and advantage to them may be gained, agree to take the shares set against their names at $169 a share, and further agree after the purchase to enter into a pooling contract whereby all the syndicate stock "shall be voted at each annual meeting for a period of not less than three years, for such Board of Directors as shall be named" by a committee of five of the subscribers, with power to a majority of them to fill any vacancy in the committee. It is said that this agreement was illegal, and that the covenant sued upon was so directly aimed at helping to bring the unlawful arrangement about that it must fall with the other. *Barnes* v. *Smith*, 159 Mass. 344, 347. *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396.

With regard to this contention it is to be observed in the first place that the syndicate agreement is dated September 4, and the covenant is dated September 22, and, as we have said, recites that the shares "have been, or are about to be" purchased. That is, the sale is treated as already certain. Although one or two subscriptions seem to have been signed a day or two later, we do not perceive why the judge may not have found that the services all had been rendered at the date of the covenant, and in view of the defendants' testimony that they never heard of those services before September 22, why he may not have found that the covenant was a voluntary. one, the legality of which would not be affected by the nature of the executed transaction which happened to furnish a motive for making it. *Gray* v. *Mathias*, 5 Ves. 286.

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Without deciding whether, if the covenant was dependent upon the rendering of further services, it was so closely connected with the syndicate agreement as to fall if the latter cannot be sustained, we pass to the question whether the latter agreement is unlawful on its face, bearing in mind that unless it is unlawful on its face it has the advantage of a finding in favor of the plaintiff. In dealing with this question it does not need to be said that combination of common interests is necessary, and constantly is taking place. It is as legitimate for a majority of stockholders to combine as for other people. The fact that they expect "gain and advantage" — in the words of the syndicate agreement — to accrue to them, does not make the combination unlawful. That expectation and intent would have that effect only if the gain was to be at the expense of the corporation, or in some way was intended to work a wrong to the other stockholders. No such intent appears, and although it is impossible not to view such an arrangement with suspicion, it is also impossible to let suspicion take the place of proof.

The only serious ground of objection is the agreement that the stock "shall be voted at each annual meeting" for three years, for a board of directors named by the committee. It is suggested that this was an unlawful attempt by the contracting parties to deprive themselves in advance of their deliberative power and duty as stockholders, and to submit themselves to the dictation of five men who in the future might not be even members of the corporation. Perhaps the notion upon which these suggestions are founded has been pressed somewhat further than would be warranted by more far-seeing views, but we have no occasion to discuss it in this broad form. The question before us is not whether it would be possible to carry out the contract in a way which would have made the contract bad if specified in it, but whether it was impossible to carry out the contract in a way which might lawfully have been specified in advance. We put the question in this form because there is no doubt that the subscribers might actually have done the things stipulated without giving any one a right to complain. That is to say, they might have held their stock and voted by previous understanding according to the advice of the committee, as long as they chose. The question is what they might contract to do; for

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this is supposed to be a case where a contract to do lawful acts is unlawful.

The syndicate agreement does not specify how it is to be carried out. It contemplates the making of another contract. As the later contract is to be a pooling contract, it was possible, if not probable, that one element of the arrangement would be that the title to the stock should be given to a trustee, and this happened in fact. During the three years the stock seems to have been held by a bank. The stock was transferred to it, and was not transferred to the members of the syndicate. But it would have been possible, consistently with the terms of the syndicate agreement, that the committee who were to name the board of directors themselves should be the trustees. In that case the trustees, of course, would have voted on the stock. They, not their *cestuis que trust*, would have been the stockholders for the time being. We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it. *Brown* v. *Pacific Mail Steamship Co.* 5 Blatchf. 525, 527. See *Greene* v. *Nash*, 85 Maine, 148.

Supposing that the committee had been trustees, what would the syndicate agreement have amounted to then? Merely an agreement by each of the trustees to vote as they should jointly agree to vote, and an agreement by the subscribers not to demand back their shares for three years. The latter term certainly is not illegal, whether valid or not. A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he cannot terminate it at will, and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. See *Williams* v. *Montgomery*, 148 N. Y. 519, 525. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other States show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together. *Faulds* v. *Yates*,

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57 Ill. 416. *Smith* v. *San Francisco & North Pacific Railway*, 115 Cal. 584. *Havemeyer* v. *Havemeyer*, 11 Jones & Spen. 506, 512, 513. Affirmed, according to Beach, Corporations, § 304, n. 6, and *Fisher* v. *Bush*, 35 Hun, 641, in 86 N. Y. 618. See *Brown* v. *Pacific Mail Steamship Co.* 5 Blatchf. 525, 527.

We have considered such decisions elsewhere as have been called to our attention or found by us. Few of them are by courts of final resort. Nothing that we have found in them satisfies us that the judge below was not warranted in finding for the plaintiff. *Judgment for the plaintiff.*

WALTER D. HARDY *vs.* BEVERLY SAVINGS BANK.

Essex. November 8, 1899. — January 3, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Interest of Attaching Creditor of Mortgagor in Surplus Proceeds of Foreclosure Sale — Notice to Mortgagee — Equity.

If a creditor of a mortgagor of land, who has attached the latter's equity of redemption, wishes to protect any interest which he may have in the proceeds remaining in the mortgagee's hands upon a foreclosure sale, he should give due notice to the mortgagee, and he cannot maintain a bill in equity against the mortgagee to recover such proceeds after the latter, without notice of the former's claim, has paid the surplus to the mortgagor or upon his order.

BILL IN EQUITY, filed December 7, 1898, in the Superior Court, alleging that on or about May 15, 1894, Samuel W. Forrest executed to the defendant a mortgage, containing a power of sale, of his interest in certain real estate in Lynn; that the mortgage was conditioned to pay the sum of $2,100, with interest, and provided that, in case of a default and subsequent sale, the proceeds should be applied first to the legal indebtedness of the defendant, and that the surplus should be paid to the mortgagor; that there had been a default in the conditions of the mortgage, and the property was duly sold according to its terms, on or about April 9, 1898, to Ralph W. Putnam, for the sum of $2,571, which sum exceeded all the indebtedness of the defendant by the amount of $219.27; that subsequently to

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the execution of the mortgage to the defendant, and prior to the foreclosure sale, namely, on June 19, 1897, the plaintiff made an attachment of Forrest's interest in the real estate described in the mortgage, and the attachment was duly recorded, as required by law, and was the first of numerous attachments and other liens recorded on Forrest's equity in the premises; that the plaintiff recovered judgment in his action against Forrest for the sum of $215, and execution was issued thereon on November 9, 1898, which had never been satisfied, in whole or in part; that within thirty days from the date of the judgment, namely, on December 7, 1898, the plaintiff had maintained his lien on the surplus proceeds of the sale of the land by filing this bill and causing a demand to be made on the defendant for the share of such surplus belonging to Forrest; and that the plaintiff was entitled to have the defendant pay over the share of Forrest in such surplus.

The prayer of the bill was that the defendant be ordered to account to the plaintiff for the proceeds of sale, and to pay over to the plaintiff the share of Forrest in such proceeds, or so much thereof as should satisfy the plaintiff's claim, after deducting the indebtedness of the defendant.

The answer alleged that, on April 29, 1898, the defendant, without notice of any legal proceedings by the plaintiff against Forrest, and upon the latter's order, paid $200 of the surplus proceeds in its hands to one Holcombe, an execution creditor of Forrest, of whose claim it had notice before the sale, and paid the balance of $19.27 to Forrest.

Hearing before *Sheldon*, J., who dismissed the bill, with costs; and the plaintiff appealed to this court.

F. E. Barnard, for the plaintiff.

D. W. Quill, for the defendant.

MORTON, J. We think that this case is governed by *George* v. *Wood*, 9 Allen, 80. In that case it was held that a mortgagee who had released a portion of the mortgaged premises was not bound to contribute to a subsequent mortgagee of the existence of whose mortgage he had no notice, actual or constructive, at the time of such release. It was further held that the fact that such subsequent mortgage had been duly recorded was not constructive notice to him. See also *Bates* v. *Norcross*,

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14 Pick. 224; *Western Union Telegraph Co.* v. *Caldwell*, 141 Mass. 489. In the opinion in *George* v. *Wood*, 9 Allen, 80, 84, it is said that when a purchaser from the mortgagor seeks to enforce his equity against a mortgagee who has released a portion of the mortgaged premises prior to the conveyance to such purchaser, "it is reasonable to require strict proof of notice. He [the purchaser] takes his title with full knowledge that it is subject to the mortgage; and if he does not perfect it by a release, he ought not to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage, in order to protect him; when by giving notice he can so easily protect himself. The establishing of such mere collateral equities, which do not affect the legal title, cannot be considered as within the purposes intended to be accomplished by the statutes for registration of deeds." We think that this reasoning applies to the case of an attachment of an equity of redemption, and that if the attaching creditor wishes to protect any interest that he may have in the proceeds remaining in the mortgagee's hands upon a foreclosure sale he should give due notice to the mortgagee. Upon a foreclosure sale the attachment is not transferred by operation of law to the funds in the hands of the mortgagee. It is only by due proceedings in equity that the creditor can secure the benefit of his attachment if there should be a surplus remaining in the mortgagee's hands upon the foreclosure sale. And we think that, as said in *George* v. *Wood*, he can easily protect himself by giving notice to the mortgagee, and that it is more reasonable to require him to do so than it is to compel the mortgagee at his peril to keep run of all attachments and conveyances subsequent to his mortgage. See Jones, Mortgages, § 1930; Fisher, Mortgages, § 846; Robbins, Mortgages, 914; *Thorne* v. *Heard*, [1895] A. C. 495; *M'Lean* v. *Lafayette Bank*, 4 McLean, 430.

We see no difference in principle between the case of a release of a portion of the mortgaged premises by the mortgagee and the case of payment of the surplus remaining on a foreclosure sale.

Decree affirmed; bill dismissed.

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WALTER PRATT *vs.* MARGARET A. BUCKLEY.

Plymouth. December 6, 1899. — January 3, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Forcible Entry and Detainer — Effect of Assignment of Mortgage to Mortgagor after Sale of Premises subject to Mortgage — Evidence.

The transfer of the mortgage note and the assignment of the mortgage to the original mortgagor after the premises have been sold subject to the mortgage, the grantee not assuming to pay it, do not constitute a discharge of the mortgage so that it cannot be enforced against the property.

If the mortgagor of land which has been conveyed subject to the mortgage, the payment of which is not assumed, upon the mortgagee threatening to foreclose the mortgage if the mortgage note is not paid, and to hold the mortgagor responsible for any deficiency, causes the amount of the note to be furnished to the grantee of the land, and subsequently takes an assignment of the mortgage and forecloses it, evidence showing that the mortgagor's intention in paying the money was to obtain the benefit of the mortgage security for a debt which was a charge upon the land, is competent in an action on Pub. Sts. c. 175, by the purchaser at the foreclosure sale to recover possession of the premises.

ACTION on Pub. Sts. c. 175, to recover possession of certain premises in Abington. The case was submitted to the Superior Court, and after judgment for the plaintiff, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

W. J. Coughlan & D. R. Coughlan, for the defendant.

L. E. Chamberlain & E. J. Fletcher, for the plaintiff.

KNOWLTON, J. This is an action of forcible entry and detainer brought under the Pub. Sts. c. 175, § 1. On March 3, 1893, Alice M. Pratt was the owner in fee of the property in dispute, and she mortgaged it to one Gould to secure the payment of $850. On March 7 of the same year she conveyed the premises to one Robinson, by a deed which recited that the land was conveyed subject to a mortgage, and which excepted the mortgage from the covenant of warranty and the covenant against incumbrances. Afterwards the mortgagee notified her that the note was unpaid, and that if it was not satisfactorily arranged at once, she should foreclose the mortgage and hold her responsible for any deficiency in the payment of the note. Ac-

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cordingly, to protect herself, she caused the amount of the note to be furnished said Robinson on the execution of an assignment of the mortgage to one Swain, which, with the note, was delivered to her agent, she intending to preserve her rights as assignee of the mortgage. Afterwards Swain assigned the mortgage to her and she foreclosed it, and the complainant in this action purchased the property at the foreclosure sale. The defendant has a title from the holder of the equity of redemption which is subject to this mortgage. The principal question in the case is whether the transfer of the note and the assignment of the mortgage to the original mortgagor after the premises had been sold subject to the mortgage, constituted in law a discharge of the mortgage so that it could not be enforced against the property.

We think it very clear that they did not. When the estate was sold subject to the mortgage, the mortgage was left as a primary charge upon the land, although the grantee did not make herself personally liable for it by assuming it. The grantor, who was the maker of the mortgage note, was entitled to have the mortgaged property applied in payment of it. To protect her own interests she might take an assignment of the mortgage and the debt, and enforce the mortgage by a foreclosure as effectually as if she was not the maker of the note. *Gibson* v. *Crehore*, 3 Pick. 475, 482. *Barker* v. *Parker*, 4 Pick. 505. *Swett* v. *Sherman*, 109 Mass. 231. *Tucker* v. *Crowley*, 127 Mass. 400. *Kinnear* v. *Lowell*, 34 Maine, 299. *Baker* v. *Terrell*, 8 Minn. 195. *Willard* v. *Harvey*, 5 N. H. 252. The question whether the debt, considered as a foundation for the mortgage title, had been cancelled and discharged, is very different from the question whether the personal liability of the maker of the note had been terminated, so that it would not exist in favor of one to whom the mortgage and note should subsequently be transferred for a valuable consideration.

It was important to know whether the money was given by Alice M. Pratt as a voluntary payment of a debt for which she was liable, or whether it was to obtain the benefit of the mortgage security for a debt which was a charge upon the land. The facts agreed in regard to her intention in paying the money were confirmatory of the apparent effect of the debt of the parties, and were unobjectionable. *Judgment affirmed.*

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EMMA E. ROOSA *vs.* FLORENCE S. A. DAVIS & another.

Suffolk. December 12, 1899. — January 3, 1900.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Appeal where no Exception was taken to Findings of Master — Allowance of Further Time for Redemption of Mortgage.

If, on a bill in equity to redeem real estate from a mortgage, no exception was taken to the findings of the master which the plaintiff seeks to have reviewed by this court, there is no question properly before it, and the decree of the Superior Court must be affirmed; but, the time allowed for redemption having expired pending the appeal, that court may, if it sees fit, allow a further time for that purpose.

BILL IN EQUITY, to redeem certain real estate in that part of Newton called West Newton from a mortgage, and to set aside as irregular and invalid an attempted foreclosure of the same. A decree was entered for the plaintiff in the Superior Court; and she appealed to this court. The facts appear in the opinion.

W. B. Orcutt & W. L. Baker, for the plaintiff.

F. N. Nay, for the defendants.

LATHROP, J. By the decree of the Superior Court the plaintiff was given the right to redeem the premises from the foreclosure of the mortgage held by the defendants, by paying to them, on or before May 19, 1899, the sum of $2,948.30, with interest at the rate of six per cent per annum from May 1, 1898, to the day of such redemption, together with the defendants' costs, to be taxed at one half the taxable costs as taxed by the clerk. The case is before us on an appeal from this decree, the plaintiff contending that the amount which she is required to pay is too large.

The case was heard by a master, and came before the Superior Court on the master's report and the plaintiff's objections and exceptions thereto. An examination of the exceptions shows that no exception was taken to either of the findings of the master which the plaintiff seeks to have reviewed by this court. There is no question, therefore, properly before us. *Popple* v. *Day*, 123 Mass. 520; and the decree of the Superior Court must

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therefore be affirmed. As the time allowed for redemption has expired, pending the appeal, that court may, if it sees fit, allow a further time for that purpose. *Decree accordingly.*

TRUSTEES OF PHILLIPS ACADEMY *vs.* INHABITANTS OF ANDOVER & others.

Essex. January 15, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Tax — Occupancy of Property of Literary Institution exempting it from Taxation — Statute — Agreed Facts — Assessment for Street Watering — Constitutional Law — Vote of Town.

The occupancy contemplated by Pub. Sts. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting from taxation the real estate belonging to literary institutions "occupied by them or their officers for the purposes for which they were incorporated," means something more than that which results from ownership and possession on the part of the institution, or the use of the property for investment purposes. It must have, or be supposed to have, direct reference to the purposes for which the institution was incorporated, and must tend, or be supposed to tend, directly to promote them.

The agreed facts in this case, which was an appeal from a decision on a petition for the abatement of a tax assessed upon the petitioner's property, are not stated with sufficient fulness to enable this court to pass satisfactorily upon the questions involved, and are therefore discharged, and the case is sent back to the Superior Court for another trial.

The St. 1895, c. 186, authorizing any town the population of which exceeds three thousand, which shall adopt the provisions of the act, to appropriate and spend money for watering its public streets, and to assess upon the estates abutting on the streets so watered the whole or any portion of the cost of such watering, is constitutional.

Where the vote of a town appropriating money for watering streets contains an express reference to St. 1895, c. 186, authorizing such an appropriation, and states that the money is appropriated under that act, the plain meaning of the vote is that the provisions of the act are to be applied in regard to the expenditure that is authorized, and in the absence of anything limiting the amount of the assessment, the fair inference is that the whole cost is to be assessed on the estates which abut upon the streets that are watered.

APPEAL to the Superior Court from a decision of the assessors of the respondent town, on a petition for an abatement of taxes assessed upon the petitioner's property therein. The case

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was submitted to that court, and after judgment for the petitioner for a portion of the amount claimed, to this court, on appeal by both parties, upon agreed facts, in substance as follows.

The petitioner is a corporation duly organized under the laws of this Commonwealth for educational purposes, and so much of its real estate as is occupied by the corporation or its officers for the purposes for which it was incorporated was not liable to taxation on May 1, 1897, or at any other time.

The petitioner is the owner of various tracts of land in the respondent town, upon some of which are nine houses. On May 1, 1897, seven of these nine houses were occupied by professors of the corporation, giving instruction in the Andover Theological Seminary, a department of the corporation. Each of the seven professors received a fixed salary per annum, and each was allowed the free use of the house occupied by him, and the land connected therewith. No charge was made to any of the professors for the rent or use of such house and land, and no deduction was made from the fixed salary of either professor, as rental or otherwise, for such use of the house so occupied by him.

The assessors of the respondent town, in May, 1897, assessed a tax upon all the nine houses and lands connected therewith, which was included in the general tax upon the petitioner. The total general tax assessed upon the petitioner for the year 1897 was $2,896.02. Of this amount $1,092 was assessed upon the nine houses and land therewith connected. One of the houses, known as the "Tucker house," was unoccupied on May 1, 1897, but had previously been and now is rented to persons having no connection with the corporation. One known as the "Park house" was occupied by Professor Park as professor emeritus, but having no duties in connection with the corporation, and paying no rent. The tax assessed upon the Tucker house in 1897 was $199.50, and upon the Park house was $76.50.

The respondent town, at an annual and regular town meeting prior to 1897, adopted the provisions of St. 1895, c. 186, relating to watering streets. The assessors assessed upon the petitioner for the year 1897 the sum of $192.27 for its proportion of the expense of watering streets. Of this amount $52.46 was assessed

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upon the seven houses above mentioned, $7.50 upon the Tucker house, $3.69 upon the Park house, and the balance, $128.62, upon the other lands and estate of the corporation.

The petitioner contends that it is entitled by law to have abated from such tax the amount assessed upon the nine houses, namely, the sum of $1,092; and also all of the sum assessed for street sprinkling, namely, the sum of $192.27.

The petitioner paid the tax in full, namely, the sum of $2,896.02, under written protest, and applied to the assessors within the time limited by law for an abatement of so much thereof as they were entitled by law to have abated. The assessors refused to abate any portion thereof, and duly notified the petitioner of this refusal, and the petitioner duly appealed from such refusal, and entered this petition, praying that so much of the taxes claimed to have been illegally assessed upon the corporation or its property be abated.

The petitioner returned a list of its property to the assessors as provided by law.

The Taylor house was conveyed to the petitioner by deed, dated June 23, 1879, in which the grantor, being then a professor, reserved for himself the right to occupy the premises for his lifetime, and a like occupation for his son, John P. Taylor, for his life, free from all rent. John P. Taylor is now a professor in the Andover Theological Seminary. At the time of making the deed, John P. Taylor was not a professor in the Theological Seminary, and the deed does not refer to such a contingency.

The respondent town, at its regular annual March meeting, 1897, appropriated a sum of money, under the provisions of St. 1895, c. 186, for watering its public streets, and duly expended such appropriation for that purpose.

If the court should determine that the nine houses, or that the property of the petitioner, or any of it, was exempt by law from the assessments hereinbefore set forth, then judgment was to be entered in favor of the petitioner for the sum so determined to have been illegally assessed; otherwise the petition was to be dismissed.

The case was argued at the bar in January, 1899, and afterwards was submitted on briefs to all the justices.

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T. H. Russell, for the petitioner.

W. Odlin, for the respondents.

MORTON, J. This case was heard on agreed facts, and the principal question is whether the property for which the petitioner was assessed was exempt from taxation, by virtue of Pub. Sts. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, which provides that "the personal property of literary, benevolent, charitable, and scientific institutions, incorporated within this Commonwealth, and the real estate belonging to such institutions occupied by them or their officers for the purposes for which they were incorporated" shall be exempt from taxation. There can be no doubt that Phillips Academy is an institution within the meaning of the exempting clause, and that, with perhaps a possible doubt in the case of Professor Park, the persons occupying the various houses were officers of the institution. *Williams College* v. *Williamstown*, 167 Mass. 505. A more difficult question is whether the property was occupied by them for the purposes for which the institution was incorporated.

It is not easy, and perhaps not possible, to define what will constitute such an occupancy under all circumstances, and we shall not attempt it; but there are some general rules and considerations which we deem it proper to state notwithstanding the disposition which is made of this case.

The occupancy referred to usually will result from the official connection of the officer with the institution, and commonly will continue only so long as such connection lasts. The Legislature could have provided, as it did formerly in the case of Harvard College (see Tax Act of 1818 and prior and subsequent Tax Acts), that such occupancy of itself should exempt the estate from taxation, or even that all of the real estate belonging to a favored institution should be exempt. Previous to the adoption of the Revised Statutes this seems to have been the case, — with a qualification after a time in regard to Harvard College and Phillips Academy. The exemptions were incorporated each year in the annual tax act, and the institutions exempted were described by name, except that beginning with 1801 there was in each act a general provision exempting academies established by the law of this Commonwealth. Phillips Academy came under this general provision, but by a proviso in

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the St. of 1821, c. 107, § 6, and in succeeding acts, it was provided (and this is the qualification referred to above) that nothing contained in the act should "prevent the Town of Andover from taxing such real estate belonging to the corporation of Phillips Academy situated in said town as shall not be under the immediate occupation and improvement of said corporation or of any person or persons connected with said corporation, exempted from taxation by this act." The persons who were exempted from taxation that were connected, or likely to be connected, with Phillips Academy were ministers of the gospel, preceptors of academies, and Latin grammar schoolmasters. These and other personal exemptions relating to "the president, professors, tutors, librarians, and students of Harvard, Williams, and Amherst Colleges, and of all other theological, medical, and literary institutions," were subsequently repealed by St. 1828, c. 143. The effect of this repeal, so far as Phillips Academy was concerned, seems to have been to cause the omission from the proviso, in subsequent tax acts, of the concluding clause which had provided by implication that real estate belonging to the corporation and occupied by any person connected with it should be exempt from taxation.

By the Revised Statutes, a general rule was established which described in a single phrase the institutions to be exempted, and limited the exemption to the real estate belonging to them and actually "occupied by them or by the officers of said institutions for the purposes for which they were incorporated." Rev. Sts. c. 7, § 5, cl. 2. This statute, with certain additions and amendments not now material, has been continued by successive re-enactments to the present time. It is manifest that, under the Revised Statutes and succeeding statutes, the mere fact that real estate belonging to an exempted institution was occupied by it or by one of its officers could not be regarded as sufficient without anything more to exempt the property from taxation, and it has not been so regarded. *Pierce* v. *Cambridge*, 2 Cush. 611. *Williams College* v. *Williamstown*, 167 Mass. 505. *Amherst College* v. *Amherst*, 173 Mass. 232. In any other view, the words, "for the purposes for which they were incorporated," would be unnecessary and meaningless. The omission from subsequent statutes of the word "actually," which was in

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the Revised Statutes, does not affect the construction. *Lynn Workingmen's Aid Association* v. *Lynn*, 136 Mass. 283, 285. Whatever else, therefore, may be said of the occupancy it must be for the purposes for which the institution was incorporated, and this renders it necessary to inquire into the nature and character of the occupancy. If, taking all of the circumstances and all legitimate considerations into account, it can be fairly said that the purpose of the occupancy is that for which the institution was incorporated, then the property is exempt, otherwise not.

The occupancy contemplated by the statute means, we think, something more than that which results from ownership and possession on the part of the institution, or the use of the property for investment purposes. It must have, or be supposed to have, direct reference to the purposes for which the institution was incorporated, and must tend, or be supposed to tend, directly to promote them. In a sense, any occupancy on the part of the institution or its officers may be said to have reference to those purposes and to promote them. But the language of the statute imports, we think, a direct, or what is supposed to be a direct, connection between the occupation and the purposes for which the institution was incorporated, and not an indirect one. It is not enough, for instance, that an income is derived from the occupancy which is applied to carrying on the institution. *Chapel of the Good Shepherd* v. *Boston*, 120 Mass. 212. At the same time the occupancy may be of the kind contemplated by the statute, notwithstanding that as incident to it rent is received, or the pecuniary value to the officer occupying is taken into account in some other manner. *Massachusetts General Hospital* v. *Somerville*, 101 Mass. 319. The distinction lies, it seems to us, between an occupancy which is for the private benefit and convenience of the officer, and which is so regarded by the parties, as in the ordinary case of landlord and tenant, and an occupancy where, although necessarily to some extent the relation of landlord and tenant enters into it, the dominant or principal matter of consideration is the effect of the occupancy in promoting the objects of the institution in the various ways in which such occupancy may or will tend to promote them. In the former case the property would not be exempt, in the latter it

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would; and the fact that the institution incidentally derived some pecuniary advantage from the occupancy would not deprive the property of the exemption to which it otherwise would be entitled.

In considering whether property is occupied so as to be exempt, regard may be had, amongst other things, to the situation of the institution. If, for instance, it is so situated that desirable residences are not or may not be easily obtained, and those in charge of it are of opinion that such officers as the best interests of the institution and of those resorting to it require can be more easily obtained if the institution provides places for them to live in, and it does so, this may be taken into account in determining whether the occupancy is for the purposes for which the institution was incorporated. Or again, if with the best interests of the institution as an educational institution in view, and for the purpose of enhancing its advantages to students and of promoting discipline and good conduct and greater freedom of intercourse between students and professors and instructors, those in charge deem it advisable that the president and professors and others connected with the institution should occupy residences in the college yard or in proximity to the college buildings, this also may be taken into account. The dominant purpose of the occupancy under such or similar circumstances may be as truly that for which the institution was incorporated, as the occupancy of buildings for recitation purposes, or for offices, or for other like purposes would be. And the occupancy does not lose what may be termed its institutional character and purpose because as incidental to it the officers and their families are provided with homes for the use and enjoyment of which by them compensation is allowed or taken into account in some manner. In many, if not most, New England colleges and academies the presence of the families of the professors and other officers has been and is regarded as beneficial to the students and as advantageous to the institution. The occupation, therefore, by them as homes of property belonging to such institutions would not necessarily be inconsistent with the spirit and intent of the exempting clause.

In considering the purpose of the occupancy, due weight is also to be given to the intentions of those in charge of the

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institution. The institution can only act through agents. In *Massachusetts General Hospital* v. *Somerville*, 101 Mass. 319, 322, it is said that "what lands are reasonably required, and what uses of land will promote the purposes for which the institution was incorporated, must be determined by its own officers. . . . In the absence of anything to show abuse, or otherwise to impeach their determination, it is sufficient that the lands are intended for and in fact appropriated to those purposes"; and again, later, "the presumption is in favor of their judgment, and it requires something more than mere difference of opinion, upon a matter of opinion especially confided to them, to overcome that presumption." Their conclusions are not final. But if consistent with other facts tending to show that the purpose of the occupancy is that for which the institution was incorporated, they well may be allowed to have a controlling effect.

The question whether in any given case the property is or is not exempt is to be determined by considering all of the facts and circumstances; and the intentions and purposes of those in charge of the institution respecting the use and occupation of the property will or may have a material bearing upon the proper determination of the question.

In applying the principles thus laid down, it is clear that not only may premises used by officers as homes for themselves and their families be so occupied by such officers as to be exempt, but also dormitories and dining-halls, and boarding-houses, gymnasiums, and other buildings intended primarily for and actually devoted to the use and benefit of students or those attending the institution for the purposes for which it was incorporated. The statute is not to be construed narrowly but in a fair and liberal sense and so as to promote that spirit of learning, charity, and benevolence which it has always been one of the fundamental objects of the people of this State to encourage.

We think there is nothing in *Pierce* v. *Cambridge*, 2 Cush. 611, *Williams College* v. *Williamstown*, 167 Mass. 505, and *Amherst College* v. *Amherst*, 173 Mass. 232, necessarily inconsistent with the views expressed above. In *Pierce* v. *Cambridge*, the question as stated in *Williams College* v. *Williamstown* "was whether the real estate was taxable to Pierce as tenant," etc. The decision was put on the ground that the facts were such as to create in

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Professor Pierce an estate as tenant for which he was taxable. Perhaps the case might have stood equally well on the ground that the occupation appeared to be rather for the private benefit and convenience of Professor Pierce than for the purposes for which the college was incorporated; so in *Williams College* v. *Williamstown* the occupation was held by the majority of the court to be for private purposes. That case stands on its own facts, and was not supposed by a majority of the court to overrule any prior cases or to change the law as it had been previously practised and understood. *Amherst College* v. *Amherst* followed the Williamstown case, and went on the ground that it could not be held as matter of law, which was the ruling of the Superior Court, that the house was exempt, though it was intimated in the opinion that it could have been found "that the dominant purposes of the president's occupation were not private, but those for which the college was incorporated." On the other hand, we think that the conclusions which we have reached are abundantly supported by *Wesleyan Academy* v. *Wilbraham*, 99 Mass. 599; *Massachusetts General Hospital* v. *Somerville*, 101 Mass. 319; *Mount Hermon Boys' School* v. *Gill*, 145 Mass. 139; and *State* v. *Ross*, 4 Zabr. 497, and *Yale University* v. *New Haven*, 71 Conn. 316. In addition to these cases, the case of *Salem Lyceum* v. *Salem*, 154 Mass. 15, should be referred to. The property in that case was held to be unexempt, but it was stated that "if the principal occupation is by the plaintiff for those purposes (i. e. the purposes for which the plaintiff was incorporated), occasional and incidental use for other purposes might not render it liable to taxation," thus recognizing that it is or may be the dominant purpose which gives character to the occupation. As illustrating still further the effect of intention not only upon the character of the occupation, but as establishing the fact of occupancy for a purpose entitling the property to exemption, see *New England Hospital* v. *Boston*, 113 Mass. 518, and *Trinity Church* v. *Boston*, 118 Mass. 164. See also *Rural Cemetery* v. *County Commissioners*, 152 Mass. 408. In this last case the petitioner, which was a cemetery corporation, was authorized to purchase additional lands to be "applied exclusively" to the objects of the corporation. It purchased land on which there was a dwelling-house and barns, and it was

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assessed for the land. At the time of the assessment, no burial lots had been laid out on the land so purchased. But it was held that it could not be said that the land was not devoted exclusively to the objects of the corporation, and that the exemption from taxation of the dwelling-house and barns was justified by the fact that the buildings and their occupation as described were necessary for the business of the corporation and the management of the cemetery, and the property was accordingly declared to be exempt. This case would seem to show that even if the occupation was required to be exclusively for the purposes for which the institution was incorporated (though we do not think it is), an occupation by an officer and his family might be regarded under some circumstances as exclusively for such purposes notwithstanding the element of private benefit. See *White* v. *Bayley*, 10 C. B. (N. S.) 227.

Whether the occupancy by Professor Taylor should be referred to his life estate or to his connection with the academy as professor, or whether the academy is taxable for its reversionary interest, we do not deem it necessary to consider now.

Down to this point we are all substantially agreed. But some of my brethren think that the facts are not stated with sufficient fulness to enable us to pass satisfactorily upon the subject thus far considered, and that the agreed facts should be discharged and the case sent back, so that the facts can be presented more fully. Others of my brethren and myself are inclined to construe the agreed facts somewhat liberally, and to think that we can decide the case now. But with this expression we yield to the views of those of our brethren who think otherwise, and are content that the agreed facts should be discharged and the case sent back for another trial.

There remains the question as to the street-watering assessments. It is hardly to be expected that any new facts which may be developed will affect that question. It will save time and further trouble, therefore, if we express our opinion on it now, and we see no objection to doing so.

The assessments were made under St. 1895, c. 186, the constitutionality of which is attacked by the plaintiff. A similar question under a similar statute was considered in *Sears* v. *Street Commissioners*, 173 Mass. 350, and the constitutionality

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of the statute was there upheld. We deem it enough on this point to refer to that case. It is settled that local or special assessments like these do not come within the exemptions from general taxation. *Boston Seamen's Friend Society* v. *Boston*, 116 Mass. 181. But it is contended that the provisions of the act were not complied with because the vote appropriating the money for street watering did not provide that the assessors should assess the cost of watering on the estates abutting on the streets that were watered. The vote did, however, contain an express reference to St. 1895, c. 186, and stated that the money was appropriated under that act. We think that the plain meaning of the vote was that the provisions of that act were to be applied in regard to the expenditure that was authorized, and that in the absence of anything limiting the amount of the assessment the fair inference was that the whole cost was to be assessed on the estates that abutted on the streets that were watered. All of the other provisions of the act were duly complied with, and we see no ground on which it can be held that the assessments were invalid.

The result is that the agreed facts are to be discharged and the case is to stand for another trial. *So ordered.*

FERDINAND J. LIBBY *vs.* INHABITANTS OF DOUGLAS.

Worcester. October 2, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

School — Certificate of Committee for Teacher — Statute — Closing of School by Committee owing to Contagious Disease in Town — Action by Teacher for Salary.

If a person employed to teach school in a town, before opening the school, met the school committee and was examined, and they authorized their chairman to sign the certificate required by Pub. Sts. c. 44, § 29, to be obtained in duplicate, one of which is to be deposited with the selectmen before any payment is made to the teacher, and the chairman then promised to give the certificate to the teacher before school should open, the facts that he did not obtain the certificate in duplicate, and that the certificate which he did get was not obtained and filed with the selectmen until two days after the school opened, will not prevent him

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from recovering compensation, in an action against the town, for services rendered after so obtaining and depositing the certificate.

It is no defence to an action against a town for salary as a teacher for a certain period, that during that time the school was closed by the school committee because of the prevalence of a contagious disease in the town, if the plaintiff, who was employed to teach during the school year for a certain sum payable in monthly instalments, kept himself in readiness to resume work, at the request of the committee.

CONTRACT, upon an account annexed, to recover salary as principal of the defendant's high school for three weeks and four days, at the rate of $800 per year, during which time the school was closed. At the trial in the Superior Court, before *Gaskill*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

R. B. Dodge Jr. & W. J. Taft, for the defendant.

J. R. Thayer & F. J. Libby, (*A. P. Rugg* with them,) for the plaintiff.

BARKER, J. The verdict for the plaintiff involves a finding that his employment was to teach during the school year, for a compensation of $800, of which sum he was to receive $80 per month, and that while the school was suspended by the committee he stood ready to teach. This leaves two questions for decision.

1. By the provisions of Pub. Sts. c. 44, § 29, every teacher shall, before he opens school, obtain from the committee a certificate in duplicate of his qualifications, and one of these certificates shall be deposited with the selectmen before any payment is made to the teacher. The defendant contends that although before opening his school the plaintiff met the committee and was examined, and although they authorized their chairman to sign the certificate for them, and the chairman then promised to give the certificate to the plaintiff before school should open, he cannot recover because he did not obtain the certificate in duplicate, and because the one certificate which he did get was not obtained and filed with the selectmen until two days after the school opened.

The purpose of the requirement that the teacher shall obtain the certificate before he opens school is to make it certain that he is qualified. Only one of the duplicate certificates is to be deposited with the selectmen. The statute is silent as to what

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shall be done with the other, and the provision that one shall be so deposited does not require that it shall be left with the selectmen before the teacher opens his school, but before any payment is made to him. While the committee might prevent a teacher whom they had hired from opening school before he had obtained the certificates, if they first vote to give them and then allow him to open school before he has them in hand, the facts that he never obtains the certificates in duplicate, and that he does not obtain one and deposit it with the selectmen until two days after he opens school, do not prevent him from recovering compensation for services rendered after he has obtained the certificate and has deposited it with the selectmen. As to the time of obtaining the certificate, and as to the requirement that it shall be in duplicate, the provisions of the statute are merely directory. The committee having authorized the chairman to sign the certificate for the committee, his signature in accordance with their action made the certificate a proper one under the statute. *Paul* v. *Hartland School District*, 28 Vt. 575. See also *Blanchard* v. *Warren School District*, 29 Vt. 433; *Wells* v. *Granby School District*, 41 Vt. 353; *Cobb* v. *Pomfret School District*, 63 Vt. 647.

2. Some weeks after the school had been opened it was closed for three weeks and four days by the committee, during which time the plaintiff at their request kept himself in readiness to teach, and at the end of the period resumed his work and taught during the rest of the school year. The committee closed the school because of the prevalence of diphtheria in the town. The defendant contends that this excuses the town from paying the teacher's salary for the time when the school was thus suspended.

Although the prevalence in the town of a contagious disease made it prudent to suspend the school, that fact is not a reason why the plaintiff should not have the compensation which had been promised him. He stood ready to teach, and failed only because the committee thought it for the welfare of the town that the scholars should not attend. The suspension was not caused by the illness of the scholars, but by a precautionary order of the committee. The prevalence of the disease made the keeping open of the school unwise, but not impossible. The

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contingency was not expressly provided for in the contract, which was that the plaintiff should teach for ten months, and that the town should pay him $800.

It is no defence that he did not teach, because the failure was not due to his fault, but to the action of the committee. They might have stipulated that the teacher should have no compensation for such time as the school should be closed because of the prevalence of a contagious disease in the town. In the absence of such a stipulation the plaintiff's right to full compensation rests upon the agreement that he should be paid $800, and is not defeated by the action of the committee in closing the school, because, while the suspension was wise and prudent, the closing was not due to any cause which made it impossible for the school to be kept open, and the teacher at the request of the committee kept himself in readiness to resume his work. *Cashen* v. *Berlin School District*, 50 Vt. 30. *Dewey* v. *Alpena School District*, 43 Mich. 480. *Smith* v. *Pleasant Plains School District*, 69 Mich. 589. *Charlestown School Township* v. *Hay*, 74 Ind. 127. *Exceptions overruled.*

PEOPLE'S SAVINGS BANK *vs.* FRANK M. HEATH.

Worcester. October 2, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Action to recover Money paid to satisfy Judgment unreversed — Agreed Facts.

If a bank pays money to satisfy a judgment obtained against it by mistake as trustee of the principal defendant in a court of competent jurisdiction, in an action in which the bank was duly served with process, and appeared and voluntarily took such steps as made the judgment a necessary result of the proceedings, it cannot recover the money of the plaintiff in the original action so long as the judgment is unreversed.

That an action by a bank to recover money paid to satisfy an unreversed judgment is submitted on agreed facts, so that all objections to the form of action are waived, cannot authorize the court to disregard the effect of the former judgment.

CONTRACT, to recover money paid by the plaintiff bank upon a judgment against it. The case was submitted to the Superior

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Court, and, after judgment for the defendant, by *Aiken*, J., to this court, on appeal, upon agreed facts, in substance as follows.

In December, 1893, the bank, summoned as trustee, in an action in favor of Heath against one Adolph Johnson, alias Adolph Johanson, in the Central District Court of Worcester, filed an answer disclosing its indebtedness "to said defendant as a depositor in the sum of one hundred and five and 65/100 dollars ($105.65), the deposit standing in name of Adolph Johnson"; and the bank supposed that its depositor and the principal defendant, of the same name, were one and the same person, it having no other depositor of that name. Heath recovered judgment against the principal defendant; the bank was charged as trustee and execution was issued against Johnson, and also against the bank as trustee, and the sum of $105.65 was paid by the bank to the officer serving the execution who made his return thereon showing the execution against the trustee satisfied. The said judgment of the District Court has never been reversed or annulled. After payment of the execution by the bank, its depositor, Adolph Johnson, having sought to draw his deposit, the bank then ascertained for the first time its mistake in fact in answering to the trustee writ that it was indebted to the principal defendant therein named as a depositor, and discovered that the principal defendant and its depositor, although having the same name, were different persons, and that at no time since the trustee writ was brought had it been indebted to the principal defendant therein named who was the debtor of Heath. Thereupon the bank paid its depositor the amount of his deposit, and subsequently demanded in writing repayment from Heath of the sum paid on the execution, but payment was refused.

F. J. Barnard, for the plaintiff.

A. S. Pinkerton, for the defendant.

BARKER, J. The savings bank paid its money to the present defendant to satisfy a judgment which he had obtained against the bank as trustee of the principal defendant in a court of competent jurisdiction, in a suit in which the bank was duly served with process, and appeared and voluntarily took such action as made the judgment a necessary result of the proceedings, and the judgment remains unreversed. Although it was obtained

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when the bank was not in fact indebted to the principal defendant, and because the bank made its answer as trustee and submitted to be charged under the mistake of falsely supposing itself indebted to the principal defendant, the judgment until reversed was a valid obligation due from the bank. Therefore it was no legal injury for the judgment creditor to take the bank's property in satisfaction of the judgment, although it would not have been entered but for the mistake. *Engstrom* v. *Sherburne*, 137 Mass. 153. The mistake was not the direct cause of the payment of the money. The payment was made because the bank wished and intended to discharge a valid judgment obligation against itself. The mistake was some steps farther back, and while it would have been good ground for some seasonable and appropriate action to reverse the judgment, it does not give the bank the right to recover the money which it has paid to satisfy a valid judgment still unreversed. *Homer* v. *Fish*, 1 Pick. 435. *M'Rae* v. *Mattoon*, 13 Pick. 53. *Wilbur* v. *Sproat*, 2 Gray, 431.

That the present case was submitted on agreed facts, so that all objections to the form of action are waived, could not authorize the court to disregard the effect of the former judgment. A submission upon facts agreed is not a substitute for proper proceedings seasonably brought to reverse a judgment, and the decision of a question so raised must be upon the theory that the judgment is in force.

Judgment for the defendant affirmed.

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INHABITANTS OF CLINTON *vs.* WILLIAM F. HEAGNEY & others.

Worcester. October 3, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

"Prosecution" of Civil Actions — Authority of Law Board of Town to bring Suits in its behalf.

As applied to proceedings upon the civil side of a court, the ordinary meaning of the word "prosecution" includes the institution of a suit, and is not confined to the mere pursuit of a remedy after proceedings have been instituted.

If the fact that a town is so populous that its legal voters cannot be warned and assembled in town meeting without expense and great loss of time, whenever it may be necessary for the town to prosecute its rights in court, is matter of common knowledge, it tends to confirm the view that when, by an elaborate chapter of its by-laws, the town provided for a law board of the principal town officers, and authorized them to choose a town solicitor and "to prosecute all litigation to which the town is a party," the town thereby authorized the board to bring suits in the name and behalf of the town; and therefore the bringing of a suit under votes of that board, authorizing the town solicitor to serve notices on the bondsmen of the defaulting town treasurer, giving them two weeks for settlement, and further authorizing the solicitor, if unable to make arrangements towards a settlement, at the end of that time to take legal measures to collect the amount due the town, and the vote engaging counsel for the town in the prosecution, make the action that of the town.

CONTRACT, upon a bond given by the defendant Heagney as treasurer and collector to the inhabitants of Clinton. The other defendants are sureties upon the bond. The writ was dated November 15, 1897, and was duly entered upon the first Monday of January, 1898.

At the trial in the Superior Court, before *Hopkins*, J., the defendants, who appeared specially, excepted in writing to the right of the attorney who entered the action to appear for the plaintiff, and demanded his authority thus to appear; and the attorney did not declare that he was duly authorized to appear by an application made to him by the party plaintiff, or by any person whom he believed to be authorized to employ him.

Other attorneys had appeared of record for the plaintiffs, and in each case the defendants had seasonably and in writing excepted to their right to appear for the party plaintiff, and had demanded their authority; and neither of such attorneys had

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declared that he was duly authorized to appear by an application made to him by the party plaintiff or by any person whom he believed to have been authorized to employ him.

The defendants seasonably filed a plea to the jurisdiction.

There was no controversy concerning the evidence. The following is an extract from the by-laws of the town:

"Sect. 1. The chairman of the selectmen, water commissioners, road commissioners, school committee, board of health, and assessors, together with the town treasurer, shall hereafter, on or before the first day of April, and whenever a vacancy shall exist, choose some competent lawyer, residing in the town, to act as town solicitor, who shall be paid such salary as they may direct.

"Sect. 2. The chairman of the selectmen shall call a convention of said officers for the purpose aforesaid, and shall give notice thereof in writing to the several officers entitled to vote therein, seven days at least before said meeting.

"Sect. 3. The several town officers aforesaid shall have authority to prosecute, defend, and compromise all litigation to which the town is a party, and to employ special counsel to assist the town solicitor whenever in their judgment necessity therefor arises.

"Sect. 4. The term of office of said solicitor shall begin on the first day of April of each year and shall continue until the election and acceptance of his successor.

"Sect. 5. The town solicitor shall . . . do every professional act which may be required of him, by vote of the town or any board of town officers. . . .

"Sect. 6. He shall prosecute all suits ordered to be brought by the town, and shall appear before any court in the Commonwealth in defence of all actions or suits brought against the town or its officers in their official capacity. Also, shall try and argue any and all causes in which the town shall be a party, before any tribunal, whether in law or equity, in this Commonwealth, or before any board of referees or commissioners."

At a meeting of the law committee named in section 1, on September 29, 1897, it was "Voted, That the town solicitor be authorized to serve notices on the bondsmen of Mr. Heagney, giving them two weeks for settlement.

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"Voted, That if the town solicitor is unable to make any arrangements towards a settlement at the end of two weeks he be authorized to take legal measures to collect the amount due the town."

Demand was made on the sureties, but no settlement was reached.

The following is a copy of the records of the law committee constituted by said by-laws, for 1898:

"Jonathan Smith, Esq., Dear Sir, — The law-committee voted to engage you as counsel for the town in the prosecution of the Heagney bondsmen."

The judge found as a fact that the town had never authorized the bringing of the action by a vote in town meeting; that the town treasurer had not authorized or assented to the bringing or prosecution of the action; that the law committee, so called, had not authorized the bringing of the action, and ruled as matter of law that if the town solicitor was directed by the law committee of 1897 to bring the suit, it had no authority so to do.

The judge sustained the plea and ordered the action dismissed; and, at the request of Mr. Jonathan Smith, the attorney appearing of record for the plaintiff, reported the case for the determination of this court.

If the order was right, there was to be judgment accordingly; if wrong, the case was to stand for trial.

J. Smith, for the plaintiff.

J. W. Corcoran, for the defendants.

BARKER, J. As applied to proceedings upon the civil side of a court the ordinary meaning of the word "prosecution" includes the institution of a suit, and is not confined to the mere pursuit of a remedy after proceedings have been instituted. That Clinton is a large and populous town, with more than twenty-four hundred legal voters, who could not be warned and assembled in town meeting without expense and great loss of time whenever it might be necessary for the town to prosecute its rights in court, is matter of common knowledge, which tends to confirm the view that when by an elaborate chapter of its by-laws the town provided for a law board or committee consisting of the principal town officers, and authorized them to choose a town solicitor and "to prosecute all litigation to which the town

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is a party," the town thereby authorized that board to bring suits in the name and behalf of the town. Therefore the bringing of the present suit under votes of that board authorizing the town solicitor to serve notices on the bondsmen of the defaulting treasurer giving them two weeks for settlement, and further authorizing the solicitor, if unable to make arrangements towards a settlement, at the end of that time to take legal measures to collect the amount due the town, and the vote engaging counsel for the town in the prosecution, make the suit the action of the town.

The report not only states the evidence, but the further fact that there was no controversy concerning the evidence. This being so, both the findings of fact and the rulings of law were wrong. The exceptions to the right of the attorney who entered the action to appear for the town and to the right of the other attorneys who have subsequently appeared of record for the plaintiff so to appear, and the plea to the jurisdiction, should not have been sustained but overruled.

Orders sustaining the exceptions and plea reversed, exceptions and plea overruled, and the case to stand for trial.

BENJAMIN F. BROOKS *vs.* RUFUS B. HOLDEN.

Worcester. October 3, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Estates of Persons Deceased — Evidence — Declarations of Deceased — Statute — Attorney and Client.

The St. 1896, c. 445, relative to evidence in an action against the personal representative of a deceased person, in which the cause of action is supported by oral testimony of a promise or statement made by the deceased person, is not restricted to actions begun after the decease, but applies to an action begun during the lifetime of the deceased, and in which, after his death, the administrator of his estate appears and takes upon himself its defence.

The St. 1898, c. 535, relative to the declarations of deceased persons, does not limit the operation of St. 1896, c. 445, relative to evidence in actions against the representatives of deceased persons.

The personal representative of a deceased client may exercise in favor of the

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client's estate the right to waive the privilege which the client had in his lifetime for his own benefit, and may call upon the latter's attorney to disclose as a witness communications made to him by the client

CONTRACT, upon an account annexed, for goods sold and for board furnished. Trial in the Superior Court, without a jury, before *Hardy*, J., who found for the plaintiff; and the defendant alleged exceptions to the exclusion of certain evidence, the nature of which appears in the opinion.

A. P. Rugg & E. I. Morgan, (*R. A. Stewart* with them,) for the defendant.

R. Hoar, for the plaintiff.

BARKER, J. In the decision of this case it is necessary to consider the effect of two comparatively recent statutes, each of which in some degree changes the law of evidence. The first is St. 1896, c. 445, relative to evidence in actions against the estates of deceased persons, and the second is St. 1898, c. 535, relative to declarations of deceased persons. We quote the language of the two enactments:

"In the trial of an action against an executor or against an administrator of a deceased person in which the cause of action is supported by oral testimony of a promise or statement made by said deceased person, evidence of statements written or oral made by said deceased person, memoranda and entries written by him, and evidence of his acts and habits of dealing, tending to disprove or to show the improbability of such statement or promise having been made, shall be admissible." St. 1896, c. 445.

"No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant." St. 1898, c. 535. The first act took effect on May 28, 1896, and the second on July 16, 1898.

The present action was begun on April 27, 1896, against Rufus B. Holden, who died on December 22, 1897. George E. Allen, the administrator of Holden's estate, appeared in the action and took its defence upon himself on June 15, 1899, and thereupon the case was tried without a jury, with a finding for the plaintiff on June 16, 1899. At the trial the plaintiff intro-

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duced in support of the causes of action set out in his declaration oral testimony of statements made by Holden. In defence the administrator called as a witness an attorney who had been employed by Holden to defend the suit, and offered to show by the witness statements made by Holden to the witness after the date of the writ and tending to disprove the statements of Holden put in evidence by the plaintiff. The question for decision is whether the evidence offered by the defendant was rightly excluded.

The statutes cited are general in form and deal only with rules of evidence, and it is not contended that they are to be restricted in their application to cases brought after they took effect, nor that they do not apply in trials upon causes of action which accrued before their passage. But the plaintiff does contend that the present action having been begun against Holden in his lifetime, it is not an action against the administrator of a deceased person within the meaning of St. 1896, c. 445, and that the provisions of that statute were intended to apply only to actions originally brought against an executor or an administrator, and in which the testimony of the deceased could not have been obtained by reason of his death occurring before the pendency of the suit.

There is no reason why the statute should be so strictly construed. When, after the death of the original defendant, the administrator of his estate appeared in court and took upon himself the defence of the action, it was no longer an action against Holden, but became an action against an administrator of a deceased person within the language and meaning of the statute. The positions of the respective parties were the same, and the reason for resorting to evidence of counter statements was the same, as if the suit had been brought originally against the present defendant. As oral testimony of statements made by the deceased intestate had been introduced in support of the plaintiff's causes of action, a case within the language and meaning of St. 1896, c. 445, was made out for the admission of counter statements of the deceased, and it was error to reject the evidence of such counter statements offered by the defendant, unless, as the plaintiff further contends, the operation of that statute has been limited by St. 1898, c. 535, or unless the evidence offered was inadmissible for some other reason.

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In considering the effect of St. 1898, c. 535, we find no reason to hold that it was intended to limit the operation of the former statute. The later statute makes no express reference to the former. The St. 1896, c. 445, had opened the door in certain actions alone, to admit in defence evidence of statements and writings made and acts done by deceased persons when the plaintiff's cause of action should be supported by oral testimony of a promise or statement made by the deceased person against whose executor or administrator the action upon trial was being prosecuted. Save as so modified, the old rules as to hearsay evidence still obtained. It was the purpose of St. 1898, c. 535, not to close this door in any degree, but to open it more widely, and to remove in all cases and in favor of all parties the objection that they were hearsay to the admissibility in evidence of declarations of all deceased persons, whether their executors or administrators were parties defendant or not, if it appeared to the satisfaction of the judge that the declaration offered was made in good faith before the beginning of the suit, and upon the personal knowledge of the person who made it. This later statute no more rendered inadmissible, because made after the beginning of the suit, a declaration or statement competent under St. 1896, c. 445, than it made inadmissible declarations of deceased persons which, although hearsay, were competent as to matters concerning which such evidence was already admissible. Its purpose was not restrictive either of the general rules which in certain instances allowed hearsay evidence, or of the special rule provided by St. 1896, c. 445, for certain suits against personal representatives of persons deceased.

The remaining contention of the plaintiff is that the evidence offered was rightly excluded because the witness was an attorney at law, and the statements to which he was called to testify were communications made to him by the deceased as a client in the course of professional employment.

In the first place it does not appear from the bill of exceptions that this question was raised at the trial or passed upon by the presiding judge. Although the fact is stated in the bill that the witness was an attorney employed by the deceased to defend the suit, it is not stated that this reason for not allowing the witness to testify to the statements made to him by the deceased

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was urged by the plaintiff or passed upon by the court, and it would seem from the statements of the bill that the ground of exclusion was the view taken by the presiding justice of the effect of the statutes already considered. Nor does it distinctly appear from the bill that the statements offered were made to the witness in the course of his employment, although it does appear that they were made after he had been employed and before the filing of the answer. However this may have been, we are of opinion that after the death of the client the administrator of his estate could waive the privilege which the deceased had in his lifetime for his own benefit, and that the calling of the attorney as a witness by the administrator, the questions put to him, and the offer of proof were a waiver of the privilege which removed any objection to the evidence upon that ground.

The privilege is primarily for the benefit of the client, the public being interested in it only to the extent that it is for the general welfare that men shall be free to consult those learned in the law without fear of injury by any disclosure adverse to their own interests. See *Foster* v. *Hall*, 12 Pick. 89; *Hatton* v. *Robinson*, 14 Pick. 416, 422; *Doherty* v. *O'Callaghan*, 157 Mass. 90. To allow the executor or administrator of the deceased client to waive the privilege and to call the attorney to testify as to a privileged communication in a suit involving the client's estate no more militates against the principle of public policy involved than to allow the client himself to waive the privilege. Nor does it tend to weaken the protection which the rule gives for the benefit of the client as an individual. The executor or administrator acts with reference to the question of waiver as the personal representative of the deceased client, and solely in the interest of his estate. While it has been said that on such facts the mouth of the attorney shall be forever sealed, and that the seal of the law once fixed upon such communications remains forever, unless removed by the party himself, in whose favor it was there placed, we know of no decided case in which it has been held that upon the death of the client his personal representative cannot waive the privilege and call upon the attorney to testify in behalf of the client's estate. In our opinion an executor or administrator of a deceased client may

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exercise in favor of the client's estate the right to waive the privilege, and may call upon the attorney to disclose as a witness communications made to him by the client.

Exceptions sustained.

ALICE M. BRADLEY *vs.* ALLEN A. HOOKER & another.

Suffolk. November 14, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Expert Testimony.

In an action for the conversion of a lounge, evidence having been introduced as to its construction and age, a witness who has qualified as an expert may, to the question, "What would be the fair market value of that sofa in July, 1897?" answer, "To anybody that liked antique furniture it was worth fifty dollars, but if it was sold at auction, or to a person who did n't care for antique furniture, it would be probably from fifteen dollars to twenty dollars."

TORT, for the conversion of one mahogany-frame lounge, covered with plush, old gold in color.

At the trial in the Superior Court, before *Bond*, J., there was evidence tending to prove a conversion on or about July 2, 1897, and for the purpose of proving the damage which the plaintiff suffered therefrom, she called as a witness one Eunice M. Fleury, who, having been asked certain questions for the purpose of showing her qualifications to testify as an expert on the value of the lounge, was asked by the plaintiff, "What would be the fair market value of that sofa in July, 1897?" to which question the witness answered: "To anybody that liked antique furniture it was worth fifty dollars, but if it was sold at auction, or to a person who did n't care for antique furniture, it would be probably from fifteen dollars to twenty dollars." The defendants objected to the answer, and asked that it be stricken out; but the judge overruled the objection. The defendants then objected to that part of the answer which stated that "To anybody who liked antique furniture it was worth fifty dollars," and asked that that part might be stricken out; but the judge overruled the objection, and the defendants excepted.

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There was no evidence from which it could be inferred that the terms "second hand furniture" and "antique furniture" are synonymous with or in any way descriptive of the same kind of furniture, or that such terms were used in that sense by Fleury; but there was evidence fully describing the construction and age of the lounge.

The only other testimony as to the value of the lounge was that of the plaintiff, who testified that it was worth between fifteen and twenty dollars.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

S. R. Cutler, for the defendants.

P. B. Kiernan, for the plaintiff, was not called upon.

HOLMES, C. J. The question called for the market value of the converted object, and the answer was an attempt to give it. The market value is at least the highest price that a normal purchaser not under peculiar compulsion will pay at the time and place in question in order to get the thing. See *National Bank of Commerce* v. *New Bedford*, 155 Mass. 313, 315. In the stock exchange buyers and sellers are brought together in a focus, with the result that there is no danger of missing the highest price by the accident of missing the man who would give it. Even if at a given moment there is no buyer of the class that would most desire a certain stock or bond, there is an organized public ready to buy upon the anticipation that such a buyer will be found, and regulating the price which it will pay, more or less by that anticipation. There is no such focus for old furniture. The answer very properly recognized the uncertainty of encountering a purchaser who would give the reasonably possible highest price, and named an alternative sum. In a case like this market value is a criterion which oscillates within limits, because, in the absence of a balance wheel like the stock exchange, it cannot be assumed with regard to a single object and a single sale that the element of accident is eliminated, and that the most favorable purchaser will be encountered.

Exceptions overruled.

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GEORGE A. DRYSDALE *vs.* HARRIS WAX & another & trustee.

Suffolk. November 15, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Mortgagee of Personal Property as Trustee — Trial by Jury of Validity of Mortgage — Statute — Condition Precedent.

Possession of personal property by the mortgagor is a condition precedent to summoning the mortgagee as trustee under Pub. Sts. c. 161, § 79, and to a trial by jury of the validity of the mortgage under § 81 of that chapter.

CONTRACT, in which chattels were attached as the property of the defendants, and the mortgagee of the chattels was summoned as trustee under Pub. Sts. c. 161, § 79, which provides that personal property of a debtor subject to a mortgage and in the possession of the mortgagor may be attached as if unencumbered and the mortgagee or his assigns summoned as trustee. The answer of the alleged trustee disclosed him to be in actual possession as mortgagee of the chattels for the purpose of foreclosure. In the Superior Court the plaintiff filed a motion for a trial by jury and the framing of issues as to the validity of the mortgage under Pub. Sts. c. 161, § 81, which motion was denied, and the trustee was discharged.

The plaintiff appealed from the decree denying the motion, and also from the decree discharging the trustee.

P. B. Kiernan, for the plaintiff.

H. W. James, for the trustee.

HOLMES, C. J. The proceeding under Pub. Sts. c. 161, § 79, is given only when the mortgagor is in possession of the personal property mortgaged. It is not given when the mortgagee is in possession, even if the mortgage be fraudulent as against creditors. The jury trial provided for by § 81 is a trial of the validity of the mortgage only, not a trial of the fact that the mortgagor is in possession, which is the condition precedent of the right to the jury trial. *Porter* v. *Warren*, 119 Mass. 535, 537. Other methods are given for reaching goods in the hands of the mortgagee. Pub. Sts. c. 183, § 66; c. 161, § 74. There is

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nothing in the record of the case at bar to show that the mortgagor was in possession, or even that the plaintiff denied the truth of the trustee's answer that he held as mortgagee in possession, assuming for the purposes of argument that the plaintiff could deny it. Therefore there is nothing on the record which warranted the plaintiff in demanding a jury trial on the validity of the mortgage and the amount, if anything, due under it. *Trustee discharged.*

PRESIDENT AND FELLOWS OF HARVARD COLLEGE *vs.* ASSESSORS OF CAMBRIDGE.

Middlesex. November 15, 16, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Tax — Exemption from Taxation of Property of College occupied as Residences by Officers of College and also used for College Purposes.

Real estate owned and provided by a college without rent or compensation, or a lease or any agreement for a fixed term for the use of students who club together for the purpose of obtaining, with the assistance of the college, food at cost, also the estate occupied by the president of the college, who pays no rent or other compensation for its use and has no lease of it, and the estate occupied by professors, all of which are kept in order and repair at the expense of the college, most of the lower portions of the houses being used for meetings and exercises connected with the college, and for different purposes incident to the offices and duties of the occupants, and the other portions being used by them and their families as dwellings, the salaries of the professors being fixed at certain sums "and the use of the house" at a sum stated, are all exempt from taxation under Pub. Sts. c. 11, § 5, cl. 8, as amended by St. 1889, c. 465.

APPEAL to the Superior Court, from a decision of the respondents on a petition for an abatement of taxes assessed upon the petitioner's property in Cambridge. Trial, without a jury, before *Bell*, J., who found for the petitioner; and, with the consent of the parties, reported the case for the determination of this court. The facts appear in the opinion.

G. A. A. Pevey, for the respondents.

S. Hoar, (*W. Sullivan* with him,) for the petitioner.

MORTON, J. This is an action to recover back taxes that were assessed by the respondents on certain parcels of real estate be-

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longing to the petitioner situated in Cambridge, which the petitioner contends were exempt from taxation under Pub. Sts. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465.

The case was heard by a justice of the Superior Court, without a jury, on what are called agreed facts, but which we interpret as authorizing him to draw such inferences as he thought warranted; he held that the property was exempt, and found for the petitioner for the entire amount, and reported the case to this court in such a manner as to present the question of the assessability of each of the parcels.

We think that the ruling of the Superior Court was right, and that all of the property was exempt from taxation. Many of the principles and considerations and authorities applicable to this case have been stated and referred to somewhat at length in *Phillips Academy* v. *Andover*, *ante*, 118, and we do not deem it necessary to repeat them here.

The history of Harvard College and of like institutions shows, we think, that from the beginning dormitories and dining-halls have been furnished by the college for the use of the students, and have been regarded as devoted to college purposes. In addition to this, the effect of the decisions in *Wesleyan Academy* v. *Wilbraham*, 99 Mass. 599, and *Mount Hermon Boys' School* v. *Gill*, 145 Mass. 139, is plainly to exempt property applied to such uses. See also *Yale University* v. *New Haven*, 71 Conn. 316, and *State* v. *Ross*, 4 Zabr. 497. We do not think that it makes any difference in principle that the college, instead of furnishing board itself, provides a place, without rent or compensation in any form, or a lease or any agreement for a fixed term, for the use of students who club together for the purpose of obtaining for themselves, with the assistance of the college, food at cost. The property so used is occupied, it seems to us, for the purposes for which the college was incorporated. Many particulars are stated in the agreed facts in regard to No. 17 Kirkland Street, which is the parcel that we are now considering, which we do not think it necessary to refer to, as it seems to us plain that the property is exempt from taxation.

The history of the college and of the legislation relating to it also shows, we think, that the president's house, during the earlier years of the college at any rate, was regarded as almost, if not

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quite, as necessary for the purposes of the institution as dormitories and dining-halls. Public money was appropriated by the general court to build it as it had been to build the college buildings, and the occupancy of it was evidently considered as official. The present house was built with funds given expressly for the purpose of erecting a dwelling-house for the president and his successors in office, and since it was built has been occupied by them and their families. The president is required to live in Cambridge. He pays no rent or compensation for the use and occupation of the house, and has no lease, but occupies it, if he chooses, so long as he performs the duties of president. It, with several of the other houses that were taxed, namely, Nos. 11, 25, and 37 Quincy Street, this being 17 Quincy Street, is now and was at the time of the assessment within the college grounds, and the premises are kept in order and repair, including grading, gravelling the walks, fertilizing, and repairing and cleaning furnace, removal of ashes, etc., under the direction of the college superintendent of buildings and the superintendent of grounds and at the college expense. The whole lower floor, "except possibly the kitchen, is used for Class Day, Commencement, and other receptions, and for many hospitalities incident to the president's functions." "The hall and drawing-room are also used for the convenience of the college and the president for meetings of the faculty and committees, for conferences with university officers and students, for calls on university business, and for the annual meetings of the corporation at which degrees are voted." The rest of the house consists of the usual living and housekeeping rooms and chambers, and is used by the president and his family as a dwelling-house.

It seems to us that on these facts the judge who heard the case was justified in finding that the dominant or principal purpose of the occupancy by the president was that for which the college was incorporated. His occupation, it could be fairly said, was, so far as the university was concerned, official, as the head of the university, just as, for instance, the President occupies the White House, and not in any just sense primarily or principally for his own private benefit.

The remaining six houses are occupied by professors, three of whom are deans, each charged with a portion of the administra-

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tive duties formerly devolving exclusively on the president. Three of the houses, as already observed, are within the college grounds. All of them are kept in order and repair at the expense of the college in the same manner and to the same extent as the house occupied by the president. The halls and drawing-rooms in all of them, except No. 37 Quincy Street, occupied by Professor Langdell, are used, partly for the convenience of the college and partly for that of the professor, for different college uses and purposes incident to his duties as professor, chairman of committees, dean, and the like. In the case of No. 11 Quincy Street, the drawing-room and hall are used by the professor for regular college exercises during the college year. In the case of No. 16 Quincy Street, the professor is Chairman of the Freshman Advisory Committee of the Faculty of Arts and Sciences, consisting of about twenty persons, and he has a great number of interviews in his drawing-room with students and parents. In the case of 25 Quincy Street, the college in 1892 made additions and improvements at its own expense so as to make the house more convenient for the transaction of college business and the entertaining of guests on college account. The additions as well as the drawing-room and hall are used for different college purposes incident to the several duties of the occupying professor. The parts of the houses to which no reference has been made are used by the professors and their families, and consist of the usual living and housekeeping rooms and chambers. In the fall of the year, when the salaries of the professors are voted, they are fixed at certain amounts "and the use of house, $750," or whatever the sum may be; otherwise the professor "pays no rent and has no other agreement for his occupation and use of said house, but uses it as such professor." We think that it was competent for the justice who heard the case to find on these facts that the dominant consideration in regard to the occupation of the houses by the several professors had reference to the performance of their duties as officers and professors, rather than to the private benefit which they would receive in the way of homes for themselves and their families, and that he was justified in finding that the occupancy was for the purposes for which the college was incorporated.

This case is distinguishable, we think, from *Williams College* v.

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Williamstown, 167 Mass. 505. In the first place, there was no question in that case as to the taxation of a building used for a dormitory and dining-hall for the students. In the next place, the occupation by the professors in this case clearly lacks the exclusive character which it was held to have in that case. In the third place, no such use for college purposes is shown to have been made of the houses occupied by the professors in that case as appears in this case. In the fourth place, the sums fixed as compensation for the use of the houses in that case were paid and received as rent, and were so treated by the court. In this case, the sums fixed for the use of the houses were allowed as part of the compensation for services as professors, thus tending to show, as said in *Massachusetts General Hospital* v. *Somerville*, 101 Mass. 319, 326, that "the occupation was one merely by reason of service," and that the value put upon the use of the house was merely "a convenient mode of adjusting the compensation . . . and not as the income or fruit of an estate granted." Lastly, this case seems to be one where the buildings are occupied, as it was said in *Pierce* v. *Cambridge*, 2 Cush. 611, 613, 614, "with the permission of the college, and without [the professors] having any estate therein, or paying any rent therefor," in which case the property would be exempt from taxation. See also *White* v. *Bayley*, 10 C. B. (N. S.) 227.

The respondents rely on *Third Congregational Society* v. *Springfield*, 147 Mass. 396, which was a case where a parsonage was declared to be unexempt. The court held that religious societies did not come within the clause that we have been considering, but within the seventh clause, and that the exemption was limited to houses of religious worship only. That case is not applicable to this.

We think that the judgment of the Superior Court should be affirmed.

So ordered.

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DANIEL QUINN *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 20, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Railroad — Action — Contract — Statute.

A brakeman in the employ of a railroad corporation, while sitting on the top of a fruit car with his legs hanging over the side, had his head struck by the cornice of a roof over a station platform about one foot and five inches from the line of the nearest rail, and about fourteen and a half feet above the rail, and was injured. He knew that the car was larger than usual, that there was this roof at this place, that there was danger from it, and that he was approaching the place. By his written application for employment he undertook as soon as possible to make a careful examination of all things near the tracks so that he might understand the dangers attending them. *Held*, that he could not maintain an action against the corporation for his injury.

An agreement, in a written application to a railroad corporation for employment, to make as soon as possible a careful examination of all things near the tracks, so that the dangers attending them may be understood, is not contrary to St. 1894, c. 508, § 6, (Pub. Sts. c. 74, § 3,) forbidding an employer to contract with an employee for exemption from liability for injury.

The provision of Pub. Sts. c. 112, § 160, requiring railroad coporations to maintain guards at every structure, any portion of which crosses the railroad above the track, does not apply to the cornice of a roof over a station platform about a foot and a half from the line of the nearest rail and about fourteen and a half feet above the rail.

TORT, for personal injuries sustained by the plaintiff, through the alleged negligence of the defendant, while in its employ as a brakeman. Trial in the Superior Court, before *Blodgett*, J., who declined to rule, as requested by the defendant, that the plaintiff could not recover; and ruled that the case should be submitted to the jury. By agreement of the parties, a verdict was returned for the plaintiff; and the case was reported for the determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise judgment was to be entered for the defendant. The facts appear in the opinion.

C. F. Choate, Jr., for the defendant.

J. E. Cotter, (*J. P. Fagan* with him,) for the plaintiff.

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HOLMES, C. J. This is an action for personal injuries. The plaintiff was a brakeman in the employ of the defendant. He was sitting on the top of a fruit car, with his legs hanging over the side, when his head struck the cornice of a roof over a station platform at Mansfield, and he was knocked off and hurt. He knew that the car upon which he sat was larger than usual; that there was this roof at this place, not very far from the cars, and that there was danger from it. He also knew that he was approaching the place. By his written application for employment he undertook, as soon as possible, to make a careful examination of all things near the tracks, so that he might understand the dangers attending them. The evidence is a little confused as to the precise distance of the cornice from the line of the nearest rail, but probably it was one foot and five inches at the nearest point where the plaintiff may be assumed to have struck, and about fourteen and a half feet above the rail.

Employees, perhaps, may be held to assume the risks ordinarily to be expected upon railroad trains, irrespective of their having actually gone over the road. It may be enough that the risks would be visible on inspection. *Ryan* v. *New York, New Haven, & Hartford Railroad*, 169 Mass. 267, 271. But it may be, also, that if structures are unusually near the track, the risk from them would not be held to be assumed by the employee unless he actually knew their situation. If such a distinction should prevail, it may be that the decisions by a gradual but inevitable process ultimately will fix the distance at which structures cease to be ordinary and become extraordinary risks. There would be nothing any more anomalous in such a result than there is in fixing the point of change between night and day, or between minority and majority, or the reasonable time for demand upon a note. Therefore it does not dispose of this case, necessarily, to ask, as the counsel for the defendant asked, how we are to draw the line between an object distant one foot and ten or eleven inches, of which the plaintiff was held to take the risk in *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287, and one distant one foot and five inches, as in the present case.

The ground of decision in *Goodes* v. *Boston & Albany Railroad* was not that the switch was one of the risks to be expected in the business, but that the plaintiff's intestate knew all about it,

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as it was. We are of opinion that the same principle must be applied in the present case. Taking the plaintiff's knowledge, as we have stated it, and his contract, together, the actual understanding between the parties, the very meaning and purport of their words was that the plaintiff took the risk of at least all those permanent structures which he had had a chance to examine and undertook to examine. This was one of them. He knew that it was dangerous, and was bound to look out for it. See *Fisk* v. *Fitchburg Railroad*, 158 Mass. 238. There is nothing in this agreement contrary to St. 1894, c. 508, § 6. Pub. Sts. c. 74, § 3. As our decision stands well enough on these grounds, we express no opinion whether the plaintiff would be held to take the risk of such a structure irrespective of knowledge, opportunity to examine it, or special contract. *Content* v. *New York, New Haven, and Hartford Railroad*, 165 Mass. 267.

The defendant was not required to maintain a guard at the cornice. The cornice did not cross the railroad within Pub. Sts. c. 112, § 160. *Judgment for the defendant.*

COMMONWEALTH *vs.* JOHN JOHNSON.

Suffolk. November 20, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Perjury — Indictment — Witness.

If the defendant in a criminal case offers himself as a witness, he may be asked if he has ever been arrested before the arrest on the charge for which he is then on trial, if he has ever been convicted of any offence, and if he has ever served a sentence in prison or for a crime; and if he answers such questions falsely, he may be convicted of perjury.

An indictment for perjury, in answering falsely certain questions asked for the purpose of showing a previous conviction of crime, need not set forth that when the questions were asked a copy of a previous conviction had been offered in evidence or was in the possession of the District Attorney.

Where the record only in a criminal case is before this court on appeal, no question whether the verdict was against the evidence is open.

INDICTMENT for perjury. In the Superior Court, after a verdict of guilty, the defendant filed a motion in arrest of judgment.

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This motion was overruled; and the defendant appealed to this court. The facts appear in the opinion.

W. H. Sullivan, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

MORTON, J. This was an indictment for perjury. There was a verdict against the defendant, and the case comes here on appeal from the order of the Superior Court overruling the defendant's motion in arrest of judgment. The grounds of the motion are: First, that no offence was sufficiently charged in the indictment; second, that the verdict was against the evidence; third, that it was against the law; and fourth, that the evidence in regard to which the perjury was alleged to have been committed was not material to the issue. The defendant had been indicted for larceny, and it was at the trial for that offence that the perjury was alleged to have been committed. He offered himself as a witness, and was asked if he had ever been arrested before on the charge for which he was then on trial, if he had ever been convicted of any offence, if he had ever served a sentence in prison, and if he had ever served a sentence for a crime. His answer to each question was a denial.

The defendant could not have been compelled to testify, and his neglect or refusal to take the stand in his own behalf would not have created any presumption against him. Pub. Sts. c. 169, § 18, cl. 3. When he became a witness he waived his privilege, and was bound to testify in regard to any matters that were pertinent to the issue. *Commonwealth* v. *Moore*, 162 Mass. 441, and cases cited. *Commonwealth* v. *Smith*, 163 Mass. 411, and cases cited.

His truthfulness was a material question, (*Commonwealth* v. *Smith*, 163 Mass. 411, 432,) and it is expressly provided by statute that "the conviction of a witness of a crime may be shown, to affect his credibility." Pub. Sts. c. 169, § 19. The matters concerning which he was asked were therefore clearly pertinent to the issue. There is nothing to show, if that is now material, that the defendant's rights were not fully protected or that the record in regard to any previous conviction was not produced.

The only objection urged to the sufficiency of the indictment

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is, that it does not set forth that when the questions were asked a copy of any previous conviction had been offered in evidence or was in the possession of the District Attorney. It was not necessary that it should be so alleged. That was a matter of evidence and not of substantive allegation in the indictment.

The record only is before us, and no question therefore whether the verdict was against the evidence is here.

We see no ground on which it can be said that the verdict was against the law.

Motion in arrest of judgment overruled; judgment to stand.

COMMONWEALTH *vs.* CHARLES H. NUTTING.

Suffolk. November 22, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Foreign Insurance — Constitutional Law — Statute.

The Legislature has power to prohibit agents of foreign insurers and brokers from soliciting or acting in regard to foreign insurance, in this Commonwealth, even though they shall agree with the assured that they are his agents.

INDICTMENT, under St. 1894, c. 522, §§ 87, 98, for negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth.

The case was submitted to the Superior Court upon an agreed statement of facts. *Blodgett*, J., having refused to make certain rulings, instructed the jury that, upon the evidence set out in the agreed statement, they would be warranted in finding the defendant guilty; and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions. The facts appear in the opinion.

E. Cowen & E. P. Carver, (*E. E. Blodgett* with them,) for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

HOLMES, C. J. The defendant is indicted for acting in the negotiation and transaction of unlawful insurance by negotiating

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in Boston with foreign insurers not admitted to do insurance business in this Commonwealth, and procuring a policy of insurance upon a vessel in Boston, to be issued by them. The agreed facts sustain the indictment subject to certain questions which are brought before us by exceptions to a ruling that the facts warranted the jury in finding the defendant guilty, and to the refusal of several requests which need not be mentioned in detail.

The foundation of the defendant's argument is the decision in *Allgeyer* v. *Louisiana*, 165 U. S. 578. That was a proceeding by the State to recover a penalty for violating a State law intended to prevent dealing with any marine insurance company that had not complied with the law. The defendants were the parties insured. The policy, an open one, was issued outside the State, and the only act done within the State was the mailing of a letter describing certain cotton to which the defendants desired the policy to attach. But the court intimate somewhat broadly that a State legislature cannot make it unlawful for a man to make a contract of insurance outside the State, although he resides and is present in the State at the time when the contract is made. It now is contended that, if this is so, it cannot be unlawful for another man to obey a request to get such insurance, if made by the one who wants it, and that the contract in the present case was made outside the Commonwealth, on principles which cannot be affected by St. 1894, c. 522, § 3. It might be argued further that at the least this was not unlawful insurance, and so that this particular indictment fails, whether the defendant had done a punishable act or not.

We bow to the decision, and even to the intimations of the case cited, without criticism. But that case expressly leaves intact the settled power of the State to impose such conditions as it pleases upon the doing of any business by foreign insurance companies within its borders. Although the reasoning of many of the cases turns on the fact that such companies are corporations, we apprehend that the power is not dependent upon that fact, but is an unsurrendered portion of the State's general right to legislate. See 165 U. S. 591; *Leavenworth* v. *Booth*, 15 Kans. 627, 634. One main object in imposing such conditions in this Commonwealth is to secure people against fraudu-

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lent or worthless contracts, and, in case of litigation, to save them from having to go abroad. See *Lamb* v. *Lamb*, 6 Biss. 420, 422. We assume, until it is decided otherwise, that the power to enforce these objects will be regarded as too important and substantial to be defeated by a device, even though the device apart from its purpose would only embody a common law right. We are of opinion, therefore, that notwithstanding the right of McKie, if so minded, to apply from Boston to the London Lloyds for insurance, the Legislature has power to prohibit the agents of the Lloyds as well as the Lloyds themselves from soliciting business in Boston, and to make that prohibition effectual by providing that it shall not be escaped by an agreement making the solicitors the agents of the insured in the transaction. In other words, while the Legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons. What we have said goes very little if any further than what is laid down in similar terms in *Hooper* v. *California*, 155 U. S. 648, 657, 658, and the authority of that case is saved in terms in *Allgeyer* v. *Louisiana*, and is recognized again in *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 566. See further *Pierce* v. *People*, 106 Ill. 11.

What the Legislature can do it has done by St. 1894, c. 522. By § 3, "it shall be unlawful . . . for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of" insurance upon any property or interests in this Commonwealth or with any resident thereof, except as authorized by the act. By § 98, "any person . . . who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance" is subjected to a penalty.

Whether the description of the insurance in the indictment as unlawful be rejected as surplusage, or whether the insurance be

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held to be unlawful within the meaning of the act and indictment because transacted through a broker acting unlawfully, an offence under the statute is set forth and the defendant properly was convicted. It is unnecessary to consider whether the same result could be reached in another way. Possibly, for the reasons given above, it would be within the power of the Legislature to enact that the insurance broker should be regarded as the agent of the insurers, whatever the agreement of the parties, and in that way reach the result that any contract made through him when he and the insured were here would be made in this State and thus would be subject to our laws. Possibly it might be argued that such was the effect of our statute, although, if so, it fails to state it as clearly as could be wished. See §§ 3, end, 87, 90. *Exceptions overruled.*

JOHN DONNELLY *vs.* ELLEN STRONG.

Middlesex. November 23, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Nullity of Marriage — Fraud.

A woman, whose husband, by whom she had a child, had procured a divorce from her in another State, became a *bona fide* resident of this Commonwealth, where she became pregnant by another man. In a conversation between them respecting marriage, she represented to him that she was unmarried, that she had never been married, that she had never before been in the family way, and that she had never had sexual intercourse with any one other than him. She gave birth to a child, of which he acknowledged the paternity, and afterwards they were married here. Subsequently he learned of the earlier marriage and that the offspring was living, but, upon being told that the first husband had died before her second marriage, he continued to cohabit with her. Later, upon learning that the first husband was living and had been divorced from his wife, he ceased to cohabit with her, and brought a libel for a sentence of nullity of the marriage. *Held*, that no such fraud had been practised upon him as to entitle him to a decree.

LIBEL, for a sentence of nullity of marriage. Trial in the Superior Court, before *Aiken*, J., who allowed a bill of exceptions, in substance as follows.

The libellant offered to prove the following facts: He and

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the libellee first became acquainted in Lowell in the summer of 1883, and after some months their relations became such that in March, 1884, she became pregnant by him. After this was known there was a conversation between them respecting marriage, the libellee representing to the libellant that she was unmarried, that she had never been married, that she had never before been in the family way, and that she had never had sexual intercourse with any one other than the libellant. He thereupon expressed himself as willing to marry her, provided the facts were as represented by her.

He had no sexual intercourse with her after learning of her pregnancy until after his marriage to her, but provided a home for her at his sister's, where she gave birth to the child, he himself residing elsewhere. In March, 1886, they were married in Lowell under the rites of the Catholic church, of which both were members, she then informing the officiating clergyman, in the libellant's presence, that it was her first marriage, which he then believed. In fact, she had married in this Commonwealth, in 1872, a man named Strong, by whom she had a child, and Strong and the child were at the time of the marriage to the libellant both living, which she well knew. Had the libellant then known of this, he would not have married her, nor would the officiating clergyman have performed the ceremony, if he had known it.

Strong, in 1880, obtained a divorce from the libellee in the Supreme Judicial Court of the State of Maine, which had jurisdiction of the parties and the cause, upon the ground of her desertion of him. By the laws of that State the libellee could not have legally married the libellant when she did without first securing special permission from the court granting the divorce, and she never sought nor obtained such permission.

Some months after the marriage with the libellant he learned that there had been an earlier marriage, and that a child, the result of it, was then living, but was told by both the libellee and the child that the first husband had died previously to her marriage to the libellant, and upon that information he made no effort to separate from the libellee. Later, and immediately upon learning that the first husband was still living, and that the libellee was a divorced woman, and had never obtained per-

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mission to marry again, he brought this libel and ceased cohabitation with her. The child born to the libellee by the libellant prior to his marriage to her is still living, and he acknowledges his paternity thereof. No question was made concerning the libellee being a resident of this Commonwealth in good faith in March, 1886.

Upon the foregoing offer of proof, the libellee asked the judge to rule that as matter of law such proof, if made, would not maintain the libel; and that the same be dismissed.

The judge so ruled, and dismissed the libel; and the libellant alleged exceptions.

N. D. Pratt, for the libellant.

P. A. Fay, for the libellee.

HAMMOND, J. The libellant concedes that at the time of the marriage he was a *bona fide* resident of this State, and that the marriage was valid here; and there is nothing in the offer of proof to show that it would not be considered valid everywhere else, including the State of Maine. *West Cambridge* v. *Lexington*, 1 Pick. 506. *Commonwealth* v. *Lane*, 113 Mass. 458, 464. *Cummington* v. *Belchertown*, 149 Mass. 223, 226, and cases cited.

But the contention is that the libellant was induced to contract the marriage by the false and fraudulent representations of the libellee "that she was unmarried, that she had never been married, that she had never before been in the family way, and that she had never had sexual intercourse with any one other than the libellant."

So far as these representations related to her previous chastity, they form no ground for decree of nullity, if for no other reason than that the libellant himself knew that at the time they were made she was unchaste, and was thereby put upon his guard; and this would be so even if her prior sexual intercourse had been illicit. *Foss* v. *Foss*, 12 Allen, 26. *Crehore* v. *Crehore*, 97 Mass. 330. *Smith* v. *Smith*, 171 Mass. 404, 406. It is to be remarked, however, that, while the representation as to other sexual intercourse was not true, still, so far as appears from the offer of proof, that intercourse being with a person who was for the time her husband was perfectly legitimate. Indeed, there is nothing whatever to show that there was any stain upon this woman's

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character for virtue except that made by her association with the libellant, or that any other person than he is responsible for her fall.

The kind of fraud necessary to form a basis for a decree of nullity of a marriage which has been consummated has been so fully defined in comparatively recent decisions of this court that it seems unnecessary here to do more than to refer to some of the cases. See *Reynolds* v. *Reynolds*, 3 Allen, 605 ; *Foss* v. *Foss*, 12 Allen, 26 ; *Crehore* v. *Crehore*, 97 Mass. 330 ; *Smith* v. *Smith*, 171 Mass. 404, 406. As stated by Bigelow, C. J., in *Reynolds* v. *Reynolds*, a marriage having been consummated, " nothing can then avoid it which does not amount to a fraud in the *essentialia* of the marriage relation."

In this case the libellee at the time of the marriage was free to enter into the contract in this State, and the contract valid here was valid everywhere. Her previous marriage had nothing whatever to do with her ability to enter into the contract, nor did the marriage impose upon the husband against his will any obligation with reference to his stepchild, and besides, he continued his conjugal relations after he knew of her existence. Bound by no tie inconsistent with the duties she was about to assume as a wife, the libellee stood at the altar, stained, it is true, but by him who led her there ; and she went to the marriage bed bearing no spurious offspring, but apt for the procreation of lawful issue.

She had concealed from his knowledge no fact in her past which in any way whatever interfered with the essentials of the marriage state ; and for aught that appears she was to him a true and faithful wife.

Exceptions overruled.

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J. D. JEWETT & another *vs.* MICHAEL MORRISON, administrator.

Suffolk. November 23, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Scire Facias — Trustee Process — Administrator — Effect of Record — Answer of Trustee.

An administrator is chargeable on *scire facias* for funds of the estate which came into his hands after the service of a trustee writ upon him in the original action.

If the record of a *scire facias* recites that the judge found for the plaintiff and charged the defendant, who, as administrator, was summoned as trustee in the original action, in a certain sum, and ordered judgment for that amount, "it having appeared at the hearing that funds came to the hands of the administrator after the service of the trustee process," the finding implies that there was a hearing at which the amount was determined.

The rule that the answer of a trustee on *scire facias* and in the original action are to be taken as true, does not apply where the defendant, who is an administrator, does not answer as to the amount which he received after the service of the writ upon him in the original action.

SCIRE FACIAS, on a judgment of the Superior Court, against the administrator of the estate of Hannah Kelley, who had been summoned in the original action as trustee of Richard L. Kelley, an heir at law of the intestate, and defaulted. The record set forth the defendant's answer, which stated that a small sum named was the entire amount of the goods, effects, and credits of the principal debtor which was in his hands at the time of the service of the original process; certain interrogatories to the defendant, and his answers to the same; and that the judge found for the plaintiff, and charged the trustee in a certain sum, and ordered judgment for that amount, "it having appeared at the hearing that funds came to the hands of the administrator after the service of the trustee process." The defendant appealed to this court.

H. J. Edwards, (*R. E. Harding* with him,) for the defendant.

A. E. Burr, for the plaintiffs.

MORTON, J. It is settled in this State that when an action is begun by trustee process, and an administrator is summoned as

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trustee, "the lien takes effect from the service of the process, and reaches the whole interest of the debtor in the personal estate that may eventually come into the hands of the administrator." *Mechanics' Savings Bank* v. *Waite*, 150 Mass. 234, and cases cited. It is also said in that case, that "since the lien is not confined to property in the administrator's possession at the time of service, it seems to follow that it would attach even if no property were in his possession at that time." The fact, therefore, that the funds for which the defendant was charged as trustee came to his hands after the service of the process upon him in the original action cannot avail him.

The court determined in some manner, we do not know how, the amount for which the defendant was chargeable. There is nothing before us to enable us to revise its action in that respect, even if it were revisable here. The finding implies that there was a hearing at which the amount was determined. It is stated in the defendant's brief that there was no hearing except the argument of counsel on the record as it now stands. But the effect of the record, it seems to us, is otherwise. The rule that the answer of a trustee on *scire facias* and in the original action are to be taken as true does not apply, because the defendant did not answer as to the amount which he received after the service of the writ upon him in the original action. He contended, in substance, that he was not chargeable for what he so received, which was plainly error. And the court thereupon, without exception or objection on his part, so far as appears, found in some way the amount for which he was chargeable. As the case stands, we think that the appeal must be dismissed and the judgment affirmed.

So ordered.

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ATTORNEY GENERAL *vs.* WILLIAM E. OLIVER.

Norfolk. December 6, 1899. — January 4, 1900.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Quo Warranto — "Memorandum of Decision" of Justice of Supreme Judicial Court — Appeal.

An appeal based simply upon the filing of a "Memorandum of Decision" of a single justice of this court, will not lie to the full bench.

There is no authority by statute or otherwise for an appeal from a single justice of this court to the full court in a common law proceeding

INFORMATION, in the nature of a *quo warranto*, to try the respondent's title to the office of constable of the town of Avon. Hearing, before *Morton*, J., who filed a paper called a "Memorandum of Decision," which concluded as follows: "I find on the evidence before me that the respondent was duly elected, and I think that the petition should be dismissed. So ordered." The counsel for the petitioner filed on June 13, 1899, the following claim of appeal: "And now comes Hosea M. Knowlton, attorney general, the petitioner in the above entitled cause, and claims an appeal to the full bench from the decree of Mr. Justice Morton therein, dated May 31, A. D. 1899."

A. P. French, for the petitioner.

T. E. Grover, for the respondent.

HOLMES, C. J. This is an information in the nature of a *quo warranto*. After the trial, before a single justice of this court, he sent to the clerk a paper entitled "Memorandum of Decision," in which, as we frequently do, he stated the reasons for his decision, and the order which he should make. This paper was no more part of the record than are the reported decisions of the full court. It is true that it contained directions as to what judgment should be entered, but it was not itself a judgment; and until something further was done the case was not in a position to be brought here. It would seem that nothing more has been done, and that the appeal is based simply upon the filing of that paper. If that were the whole difficulty, however, we should give an opportunity to move for the entry of a judg-

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ment *nunc pro tunc*. But the trouble goes deeper. It is that we are aware of no authority, by statute or otherwise, for an appeal from a single justice of this court to the full court in a common law proceeding. The reasons for denying the right are stated by Chief Justice Gray in *Cowley* v. *Train*, 124 Mass. 226. See also *McCallum* v. *Lambie*, 145 Mass. 234, 236. In the respondent's brief, the objection to our entertaining the appeal is raised and insisted upon in terms amounting to a motion to dismiss. We have no choice but to grant it.

Appeal dismissed.

ELIZA J. SAUNDERS *vs.* MARY F. DUNN, administratrix.

Suffolk. December 6, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Promissory Note — Mortgage — Consideration — Evidence.

If a mortgage is given as security for the payment of a promissory note, it may be shown that the note is without consideration, and that therefore the mortgage cannot be enforced; and admissions of the mortgagee, who has deceased, to show that no debt ever existed between the parties to the mortgage are rightly received.

BILL IN EQUITY, asking for the cancellation and delivering up of a promissory note and mortgage of personal property securing the same, given by the plaintiff to the defendant's intestate, on the ground that no consideration was ever received by the plaintiff, and that the conveyance was in effect a trust transaction.

At the trial in the Superior Court, before *Lilley*, J., there was evidence of several witnesses tending to show that the note was without consideration, and, against the defendant's objection and exception, the following evidence was admitted: "I asked Miss Dunn if it was a mortgage she had made out. She said, 'Oh, no; it is just simply a matter of form between she and I. There has no money passed between us, simply I am to help her out in the case of her death,'" the contention being that the note and mortgage were given to the intestate for the purpose of giving her such a hold on the property and business as would

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allow her to sell the same on the death of the plaintiff and give the proceeds to her niece.

The judge found that the note and mortgage were without consideration, and only constituted the intestate a trustee to manage the property in the event of the plaintiff's death, and entered a decree that the note and mortgage be cancelled and delivered up to the plaintiff. The defendant appealed to this court.

R. Lund & H. S. Riley, for the defendant.

J. A. Curtin, for the plaintiff.

KNOWLTON, J. In an action at law to foreclose a mortgage, or in a bill to redeem, the mortgage is only available to secure the performance of the condition. If this condition is the payment of money, the question is how much in equity and good conscience, under recognized rules of law, is due the mortgagee. *Vinton* v. *King*, 4 Allen, 562. *Holbrook* v. *Bliss*, 9 Allen, 69. In *Wearse* v. *Peirce*, 24 Pick. 141, it was held that where a mortgage is given as security for the payment of a promissory note, it may be shown that the note is without consideration, and that therefore the mortgage cannot be enforced. In *Hannon* v. *Hannon*, 123 Mass. 441, the same doctrine was applied to a mortgage, the condition of which was the payment of a sum of money stated in the mortgage, with a reference to a promissory note for the same amount, given as a personal promise to make the same payment. The decision in this case fully covers the questions argued by the defendant in the case at bar. The provisions of the mortgage in respect to payment are substantially the same, and the evidence to show that the promise to pay was without consideration was like that now before us.

The admissions of the mortgagee were rightly received, and the judge properly found that the note and mortgage were without consideration, and should be given up and cancelled. See also *Freeland* v. *Freeland*, 102 Mass. 475; *Donohue* v. *Chase*, 139 Mass. 407.

Exceptions overruled.

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SUSAN LOWNER *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. December 7, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries occasioned by Fall of Pail from Railroad Bridge — Question for Jury.

At the trial of an action for personal injuries caused by a pail of sand falling upon the plaintiff's head as he was walking upon a street, and coming out from under a railroad bridge in the possession of the defendant railroad, there was testimony that there was more or less of a practice on the part of people living in the neighborhood to walk across the bridge, although they were trespassers, and it also appeared that a witness of the accident who went at once up to the track saw no one there, except a switchman coming toward the bridge from a switch house. *Held*, that while there was only inference to show who was responsible for the fall, the jury would have been warranted in inferring that it was the defendant, and that the question should have been submitted to them.

TORT, for personal injuries. Trial in the Superior Court, before *Blodgett*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

G. W. Anderson, (*S. A. Fuller* with him,) for the plaintiff.

C. F. Choate, Jr., for the defendant.

HOLMES, C. J. This is an action for personal injuries caused by a pail of sand falling upon the plaintiff's head as she was walking upon a street and coming out from under a railroad bridge in the defendant's possession. The court directed a verdict for the defendant, and the question is whether the plaintiff was entitled to go to the jury. The evidence clearly warranted a finding that the pail fell from the bridge, and the fact of its falling upon the plaintiff warranted a finding of negligence. *Hogan* v. *Manhattan Railway*, 149 N. Y. 23. See *Kearney* v. *London, Brighton, & South Coast Railway*, L. R. 6 Q. B. 759. But there was only inference to show who was responsible for the fall, and the question as narrowed is whether the jury would have been warranted in inferring that it was the defendant.

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There was testimony that there was more or less of a practice on the part of people living in the neighborhood to walk across the bridge, and, although they were trespassers, the suggestion is that so long as the fact was so, the pail may as well have come from one of them as from a servant of the railroad. On the other hand a witness of the accident who went at once up to the track saw no one there, except a switchman coming toward the bridge from a switch house. Therefore the jury would have been warranted in inferring that the pail had been left on the bridge by somebody, and did not fall from a person's hands. If they found this to have been the fact, they might find further that the defendant was so much more likely than any one else to leave a pail of sand in that place that they would infer that it did leave the pail there. They might consider this inference as made more reasonable by the contents of the pail. Notwithstanding what is said as to present methods of sprinkling sand on tracks and as to the absence of need for it at that time of the year (May), they well might think that, taking place and contents together, the chances were so much against the defendant as to make its responsibility a good deal more than a guess. If they should think so we could not say that they were wrong.

Exceptions sustained.

JAMES M. YORK *vs.* WILLIAM N. BARSTOW.

Middlesex. December 7, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Mechanic's Lien — Description of Premises in Certificate — Exceptions.

It cannot be said, as matter of law, that there was error in declining to give a ruling requested, if it does not appear that the bill of exceptions contains all of the evidence material to such request.

PETITION, to enforce a mechanic's lien, under Pub. Sts. c. 191. Trial in the Superior Court, without a jury, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

The petitioner, in September, 1897, made an oral contract

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with the respondent to do all the carpenter work on the respondent's building. It was admitted that the petitioner duly performed his contract, and ceased to perform labor and furnish materials on January 24, 1898; and that he was entitled to maintain his lien, if the description of the property on which he seeks to enforce his lien is sufficiently accurate for identification. This was the only question presented.

The premises upon which the petitioner claims his lien are described in his certificate as follows: "The bakery property on the northerly side of Summer Street in said Somerville opposite Windom Street containing the bake-house and engine-house lately erected thereon. Said lot of land being owned, to the best of my knowledge and belief, by William N. Barstow."

Evidence was offered that the building was about one hundred feet long and fifty feet wide; that a partition wall twelve inches thick divided the building nearly half way and extended about one foot above the roof; that one part of the building was fitted up as a bakery and the other part as a stable; that the petitioner contracted to build only one building, and only knew of one building; that it might be called two buildings, or one building; that there was no engine-house on the premises, and no engine except the one put into that part intended for a bakery; and that the petitioner knew nothing about any division of the property, or transfer of part of the property, to Nellie E. Barstow.

It was admitted that the petitioner did work both on the bakery and the stable; that the account set forth in his certificate does not show the amount of work done upon each, so that no apportionment of his work can be made; and that one mortgage of the bakery was given to the Somerville Co-operative Bank by William N. Barstow, and another mortgage of the stable was given by Nellie E. Barstow to the bank after the work was begun and before the certificate was filed.

The respondent contended that the description covered only the bakery and did not include the stable; and asked the judge to rule that the description of the premises upon which the petitioner sought to enforce his lien was not sufficiently accurate for identification. The judge refused so to rule, and ordered that the lien be established; and the respondent alleged exceptions.

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G. E. Jacobs & H. D. Moore, for the respondent.

J. J. Higgins, for the petitioner.

HAMMOND, J. The judge sitting without a jury declined to rule that the description of the premises contained in the petitioner's certificate was not sufficiently accurate for identification, and upon the evidence found for the petitioner.

It is manifest that the bill of exceptions does not recite all the evidence in the case; nor, although certain evidence material to the ruling requested is reported, does it appear that the bill contains all the evidence thus material. For aught that appears to the contrary, the judge may have been justified in finding upon the evidence that the stable was to be used for the keeping of teams connected with the bakery business, or that in some other way it was to be used in connection with that business. The term "bakery property" may properly be held to include not only those parts of the estate in which the process of baking is carried on or intended to be carried on, but also those other parts which are used or are intended to be used for storage, distribution, or other purposes connected with that business.

Since it does not appear that all of the evidence is before us, we cannot say as matter of law that there was error in declining to give the ruling requested by the respondent.

Exceptions overruled.

CATHERINE B. MUNRO *vs.* CALVIN STOWE.

Suffolk. December 8, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Conversion — Attachment — Trial — Evidence.

In an action against an officer for the conversion of personal property, which either he personally removed or permitted to be removed while he held it under attachment, to a house where the plaintiff had no rights, it appearing that upon two occasions when there was no attachment upon the goods the plaintiff ineffectually demanded a return of them, the defendant is not entitled to a ruling that if "at the dissolution of the attachment the keeper was removed, and the goods were left where they were found when the attachment was made, the defendant is not liable," or that he "was not bound, upon dissolution of the at-

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tachment, to do anything more than to remove his keeper and leave the goods where he found them."

After the defendant's counsel, in an action against an attaching officer for the conversion of personal property, had cross-examined the plaintiff for about two hours as to the general evidence, and had also examined her in detail in regard to many items of the declaration in such a way as to indicate that little if anything more of importance could be elicited by further examination, the judge informed the counsel that only one hour more would be allowed him for the cross-examination of that witness. *Held*, that this direction appeared to be entirely reasonable.

Upon the facts of this case, which was an action for the conversion of a quantity of furniture in a lodging-house, the witnesses properly were allowed to testify to its value as a whole.

The declarations and conduct of a witness, in an action for the conversion of personal property, when trying to sell the property, which tend to contradict his testimony in regard to its value, are competent.

TORT, for the conversion of a quantity of household furniture. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

O. Storer, for the defendant.

F. P. Curran, for the plaintiff.

KNOWLTON, J. The plaintiff was the owner of a quantity of household furniture in a lodging-house. She made a bill of sale of it as security for the payment of a debt, and the holder of the bill of sale, with her consent, leased it to one Heath, who knew the condition of the title. Afterwards the plaintiff took an assignment of the lease from the holder of the bill of sale, and demanded from Heath the payments to which she was entitled, after notice to him of the assignment. He neglected to pay, and by the terms of the lease she was entitled to the goods on account of his failure to perform his contract. Thereupon, on May 3, 1897, Heath caused the defendant, as a constable, to attach the furniture on a writ returnable on May 22, 1897, in which Heath was plaintiff, and the present plaintiff was defendant. This attachment was dissolved on June 25, 1897, by a bond given in due form under the statute. On June 26, 1897, this defendant, as a constable, attached the property again on a writ sued out by Heath against the same party. This writ was returnable on July 24, 1897, but it never was returned to the court, because, as this defendant says, it could not be found on the return day. While the property was held under the first

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attachment, it was removed from 511 Massachusetts Avenue, the lodging-house where it was when first attached, to 666 Tremont Street, the removal having been made either by Heath or by the present defendant. While these attachments were in force the goods were in charge of a keeper appointed by this defendant. After the failure to enter the last mentioned writ, another attachment was made by this defendant upon the same property, on a writ bearing date July 26, 1897, in which the same parties were plaintiff and defendant respectively, and a keeper was again placed in charge. This writ was duly entered in the court, but the proceedings were terminated by a nonsuit of the plaintiff in the following September. Heath testified in cross-examination that the purpose of attaching the property on these writs was to retain it, and prevent the present plaintiff from obtaining possession of it. On June 26, 1897, and again on November 4, 1897, this plaintiff demanded a return of the goods from the present defendant, but he failed to return them. The defendant's exceptions are to the refusal of the judge to give two instructions requested,* to an order limiting the cross-examination of a witness, and to the admission of certain testimony in regard to the value of the goods.

The instructions requested were not applicable to the case. On the admitted facts the defendant was liable for a conversion of the property. It is shown by evidence, which appears to have been undisputed, that upon two occasions when there was no attachment upon the goods the plaintiff ineffectually demanded a return of them. The failure to deliver them constituted a conversion. The ruling that "the defendant was not bound, upon dissolution of the attachment, to do anything more than remove his keeper, and leave the goods where he found them," would be correct as applied to a case where he had attached the goods upon the premises of the defendant in this action, and left them there in charge of a keeper. In such a

* The instructions requested were as follows: "1. If the jury find that at the dissolution of the attachment the keeper was removed, and the goods were left where they were found when the attachment was made, the defendant is not liable. 2. The defendant was not bound, upon dissolution of the attachment, to do anything more than remove his keeper and leave the goods where he found them."

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case the removal of the keeper would leave the property in the defendant's possession. But it would have no application to a case like the present, in which the attaching officer either personally removed the property, or permitted it to be removed while he held it under attachment, to a house where the defendant had no rights.

The court may impose a reasonable limitation upon the cross-examination of a witness. *White* v. *McLean*, 47 How. Pr. 193. *Rand* v. *Newton*, 6 Allen, 38. *People* v. *Court of Oyer & Terminer*, 83 N. Y. 436. *Gatterson* v. *Morse*, 58 N. H. 165. *Strauss* v. *Meertief*, 64 Ala. 299. We see nothing to indicate that this power of the court was improperly exercised in the present case. After the defendant's counsel had cross-examined the plaintiff for about two hours as to the general evidence, and had also examined her in detail in regard to fourteen items of the declaration in such a way as to indicate that little if anything more of importance could be elicited by further examination, the judge informed the counsel that only one hour more would be allowed him for the cross-examination of that witness. So far as appears from the bill of exceptions, this direction was entirely reasonable.

The plaintiff and two other witnesses were allowed to testify as to the value of the furniture. They testified in such a way as to warrant the judge in allowing them to give their opinions. Each of them had been at one time very familiar with the property, and at that time had considered it in reference to its value. Each of them had had considerable experience in buying and selling household furniture. It is true that their experience had been chiefly in determining the value of furniture in furnished houses, to be used with the house, but that necessarily involved a consideration of the cost of the furniture, and its value apart from the house. The questions put to each of them were proper, and if some of the answers were mistakenly made upon a false assumption, there was ample opportunity for correction, and in the course of the trial proper information and modifications were given to the jury. The fact that these witnesses could not remember very particularly the numerous individual articles which made up the list of things alleged to be converted, did not make it necessary to reject their testimony. Each of

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the witnesses had looked over the whole while considering its value. Heath testified in such a way as to indicate that the goods delivered under the bill of sale were the same taken by the defendant. The list given in the declaration was identical with that in the bill of sale, and he said that most of the goods named were at the place of attachment when each attachment was made, but that there were quite a number of articles named which had never been at either place. This was equivalent to a statement that there was a mistake in the list contained in the bill of sale, while the attachment covered all the goods which were in fact at the house when the bill of sale and the lease were made, and when the plaintiff's witnesses examined the property. In a case like the present, where the property had been for a considerable time out of his possession, it would be difficult, if not impracticable, for a plaintiff to produce definite evidence as to the value of each article included in the furnishings of a large house, and we see no objection to permitting witnesses who had examined the whole to testify in chief as to its value as a whole.

Nor was the evidence incompetent by reason of the length of time between the examinations of the witnesses and the conversion. Heath and his wife testified that he found the goods at the house in a bad condition, and that they were in as good condition at the time of the trial as when the attachment was made. The time when he found them in bad condition, as he says, was the exact time to which the testimony of the plaintiff and of one of her witnesses relates. The testimony of the other of her witnesses relates to a later time, while the goods were in Heath's possession. Moreover, it was only six or seven months between the time when the plaintiff made her bill of sale and the defendant made the first attachment, and the judge might well think that there was no such probability of material change in their condition as to require the exclusion of the evidence.

Heath's declarations and conduct, when trying to sell the property, were competent as tending to contradict his testimony in regard to its value.

Exceptions overruled.

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CHARLES F. SPARGO *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. December 8, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Negligence — Evidence as to Speed of Horse.

In an action for personal injuries against a street railway company, it appeared that when the plaintiff, who was driving, was overtaken by the defendant's car which was going in the same direction, the horse took fright and dashed the wagon against a tree and the plaintiff was thrown to the ground. The plaintiff, who contended that the car was running at an excessive rate of speed, and that the motorman, knowing that the horse was frightened, negligently sounded the gong and failed to diminish the speed of the car, offered the evidence of the owner of the horse as to the capacity of speed of the horse to show that the horse was a speedy animal. *Held*, that the evidence had no tendency to show at what rate of speed the car or even the horse was going at the time of the accident, and that it was rightly rejected.

TORT, for personal injuries occasioned to the plaintiff on April 20, 1897, by being thrown from the wagon on which he was riding. At the trial in the Superior Court, before *Blodgett*, J., there was evidence tending to show that the plaintiff, a caterer, was driving a loaded wagon in Boston when he was overtaken by a car of the defendant company, which was going in the same general direction; that his horse took fright, swerved in towards the sidewalk and dashed the wagon against a tree which projected into the street beyond the line of the curbstone, and that the plaintiff was thrown to the ground. The car at the time had reached a point some sixty feet beyond the spot where the plaintiff struck.

The evidence was contradictory as to whether the horse was galloping, and as to the point where he began to gallop.

The plaintiff contended that the car was running at an excessive rate of speed and that the motorman, knowing that the horse was frightened, negligently sounded the gong and failed to diminish the speed of the car. The plaintiff called one Crane, the owner of the horse, and, for the purpose of showing the probable rate of speed of both the horse and car, interrogated him as to the capacity for speed of the horse. The judge rejected

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the evidence, and the plaintiff excepted. Had the witness been permitted to answer, he would have testified that the horse was a speedy animal.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

S. H. Tyng, for the plaintiff, relied principally on *Whitney* v. *Leominster*, 136 Mass. 25.

W. B. Farr, (*M. F. Dickinson, Jr.* with him,) for the defendant.

HAMMOND, J. That the evidence offered had no tendency to show at what rate of speed the car, or even the horse, was going at the time of the accident is too plain for discussion. It was rightly rejected. *Exceptions overruled.*

NICOLA MUTO *vs.* E. IRVING SMITH & another.

Middlesex. December 8, 1899. — January 4, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Mechanic's Lien — Description of Premises in Statement — Reference to Deed.

Where land is conveyed to a person, who makes a mortgage of it, excepting a certain portion, upon which portion subsequently a third person does work, the latter cannot maintain a mechanic's lien therefor, if he files in the registry of deeds a statement which follows the description of the premises in the mortgage, thus excluding by metes and bounds the land on which the work was done; and the fact that the statement, besides the description by metes and bounds, contains the words "being the same premises described in deed" to the respondent and in the mortgage, does not help the petitioner.

PETITION, to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor performed upon land in Malden. Trial in the Superior Court, without a jury, before *Hardy*, J., who found for the respondents; and the petitioner alleged exceptions. The facts appear in the opinion.

F. C. Dowd, for the petitioner.

E. H. Lounsbury, (*E. B. Church* with him,) for the respondents.

HOLMES, C. J. This is a petition to enforce a mechanic's lien against land of the respondents. The land was conveyed

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to the respondents, and they made a mortgage excepting a portion in the northeast corner. The petitioner's work was done upon this northeast corner, and consisted of digging and walling a cellar for a dwelling-house intended to be built upon it. But when the petitioner came to file his statement in the Registry of Deeds, instead of describing the whole land conveyed to the respondents, or the northeast corner, if that was to be treated as a separate lot, (*Whalen* v. *Collins*, 164 Mass. 146,) he followed the description in the mortgage deed, and therefore excluded by metes and bounds the very land on which the work was done. The judge before whom the case was tried found for the respondents, and the case is here on exceptions. The petitioner contends that as matter of law he is entitled to a finding, because the statement, beside the description by metes and bounds, contains the words "being the same premises described in deed" to the respondents and in the above mentioned mortgage deed.

The statement of the case disposes of it. This is not an instance of a *falsa demonstratio* injected into a description otherwise sufficient to identify the land, where, taking all the words in the light of knowledge of the place, it is apparent that the right land is meant. The description is perfectly plain and excludes the right land. It is said that the description is defective and cannot be applied to the land without extrinsic aid. The part of the description referred to is "thence southeasterly 98.70 feet to a point distant 137 feet westerly from said Madison Street 112 feet to said first mentioned land of O'Donnell." But it is plain on the face of the words that there is a word understood before "112 feet," and that that word is "thence," and this is still plainer when the whole statement is read. If that word is inserted the description is not defective. It follows that the reference to the deeds, even if they agreed in giving different boundaries, makes no difference, because it is settled that a description by metes and bounds is not controlled by such a reference. *Dana* v. *Middlesex Bank*, 10 Met. 250, 255. *Morrow* v. *Willard*, 30 Vt. 118. But in fact the reference does not help the petitioner, for only the land described in the statement is described in both the deeds. The northeast corner on which the work was done is described in the conveyance to the respondents, but, as we have stated, not in the mortgage. Indeed the

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reference only makes it plain that it was intended to follow the mortgage in the statement.

It was not argued that the fact that the lien is claimed for work and materials "in the erection of a building situated on a lot" described in the foregoing manner, identified the lot by reference to the building on which the petitioner worked. There is a hint that such a reference might have some effect in *Bristow* v. *Evans*, 124 Mass. 548, 552. But there was a building on the land described, and, if there had not been, it would be going too far to allow such a reference to override the express description and to satisfy the statute. See *Doherty* v. *Hill*, 144 Mass. 465, 469. *Exceptions overruled.*

ELIZABETH A. HYDE *vs.* SAMUEL GANNETT & another, executors.

Suffolk. December 14, 1899. — January 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Evidence — Private Conversations between Husband and Wife — Statute.

The St. of 1896, c. 445, entitled "An Act relative to evidence in actions against the estates of deceased persons," does not repeal the law as it previously stood as to private conversations between husband and wife.

CONTRACT, for services as custodian of a house of the defendants' testator, Edward L. Pierce. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

After the plaintiff had testified as to her contract with the defendants' testator made on January 18, 1897, and the following entry from the testator's diary of the same date had been put in, "Mrs. Hyde came to my brother's Dorchester house to be its custodian. No rent, wood, and coal to be supplied by me," the defendants' counsel, relying on St. 1896, c. 445, entitled "An Act relative to evidence in actions against the estates of deceased persons," asked the testator's widow the following question: "Whether or not, subsequently to that, Mr. Pierce made any

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statement to you in reference to the arrangement which he had made with Mrs. Hyde?" And the plaintiff's counsel objected. The judge sustained the objection and excluded the question upon the statement by the defendants' counsel that the conversation was had when no other person was present. The defendants' counsel then stated to the court that the answer which he expected to the question was that the testator stated in the conversation that the terms upon which the plaintiff was engaged as custodian were the same as were shown by the entry in the testator's diary.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

A. R. Tisdale, for the defendants.

D. W. Reid, for the plaintiff.

MORTON, J. The statement of the defendants' testator contained in the extract from his diary was already in evidence when the conversation between him and his wife was offered and excluded. In view of that fact it may be doubtful whether the defendants suffered any injury by the exclusion of testimony tending to show that their testator had made the same statement to his wife. But we think that the ruling was right on the ground on which it was evidently put, namely, that the evidence related to a private conversation between husband and wife. St. 1896, c. 445, on which the defendants rely, is to be construed, we think, as removing, under the circumstances therein provided for, the objection to the admissibility of certain testimony relating to the deceased, and as authorizing the admission of such testimony when but for the objection thus removed it would have been incompetent according to the settled rules of evidence, statutory and otherwise. At common law private conversations between husband and wife are inadmissible, and the statute making husband and wife competent as witnesses expressly recognizes this rule. Pub. Sts. c. 169, § 18, cl. 1. *Dexter* v. *Booth*, 2 Allen, 559. 19 Am. & Eng. Encyc. of Law, 152. We cannot think that the Legislature, without referring in any way to it, intended by the passage of St. 1896, c. 445, to repeal the law as it previously stood in this particular.

Exceptions overruled.

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FIRST NATIONAL BANK OF CHICAGO & others *vs.* JOHN M. GRAHAM.

Suffolk. March 23, 1899. — January 5, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Petition to compel the giving of Testimony — Statute — Practice.

The Superior Court has no jurisdiction of a petition, brought by the parties and not by the magistrate, to compel the giving of testimony under Sts. 1888, c. 195, and 1898, c. 374.

PETITION, by creditors of the Northrup-Braslan-Goodwin Company, an insolvent corporation, organized under the laws of the State of Illinois, and having its usual place of business in the city of Chicago, in said State, praying to have the respondent adjudged in contempt for refusing to answer interrogatories and to produce certain documents. The petitioners had duly proved their respective claims under a voluntary assignment of the corporation for the benefit of creditors, pending in the County Court of Cook County in the State of Illinois. The petitioners had filed a petition in said court seeking to set aside and vacate a judgment and execution and levy thereon secured by the International Trust Company, of Boston, on the ground that the judgment note, the judgment thereon, and the execution and levy were obtained by collusion between the respective attorneys and officers of the Northrup-Braslan-Goodwin Company and the International Trust Company, and that they constituted a fraudulent preference by the laws of Illinois.

At the request of the petitioners a commission for taking the testimony of the respondent, president of the International Trust Company, was duly issued from the County Court of Cook County to Mr. George C. Taber, a notary public of Boston, requiring the respondent to appear and answer certain interrogatories. The respondent duly appeared with counsel, but declined to answer all of the interrogatories propounded to him or to produce the documents called for.

Upon hearing in the Superior Court, before *Hopkins*, J., a

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decree was entered ordering the respondent to answer the interrogatories which he had refused to answer, and also to produce the documents called for, but without prejudice to the right of objection to the admission of the answers at the trial of the case pending before the County Court of Cook County, Illinois. The respondent alleged exceptions.

The case was argued at the bar in March, 1899, and afterwards was submitted on briefs to all the justices.

R. M. Morse, (*J. Duff* with him,) for the respondent.

S. L. Whipple & H. W. Ogden, for the petitioners.

LATHROP, J. We see no ground for holding that the Superior Court had jurisdiction of the petition which has been brought by exceptions to this court. The Pub. Sts. c. 169, have no application. Whether a commissioner appointed by another State to take a deposition of a witness in this Commonwealth can be considered a "tribunal" within the meaning of that word in the St. of 1883, c. 195, entitled "An Act to enforce the attendance of witnesses before special tribunals," it is unnecessary to consider, for if he be such a tribunal, the application must be made by the tribunal to a justice of the court, and not by the petitioners. So, under the St. of 1898, c. 374, entitled "An Act relative to the giving of testimony by witnesses before special tribunals," the application must be made by the "magistrate or tribunal."

The matter having been thus provided for by statute, we are of opinion that the remedy given is exclusive in a case of this kind, where it is sought to take a deposition here under a commission issued by a court in another State. The commissioner in such a case is an officer of the court issuing the commission, and if he neglects to perform his duty, the remedy is for the court where the action is pending to appoint another commissioner.

The petitioners contend that the petition may be treated as a bill for discovery; but the entire framework of the bill shows that it is not a bill for discovery, but an application to compel a witness not a party to the proceeding in Illinois to answer interrogatories under a commission issued in that proceeding by a court in Illinois.

The result is that the decree of the Superior Court must be reversed and the petition dismissed. *So ordered.*

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HENRY A. GORDON, administrator, *vs.* WEST END STREET RAILWAY COMPANY.
SAME *vs.* SAME.

Suffolk. November 13, 1899. — January 5, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Loss of Life — Street Railway — Unfitness of Servants — Passenger — Negligence.

In an action against a street railway corporation under St. 1886, c. 140, for causing the death of a person who, while in the act of boarding a car, which had stopped, was thrown to the ground by reason of the conductor starting the car too quickly, the judge instructed the jury, as requested, that there was no evidence that the deceased lost his life by reason of the unfitness of the defendant's servants, and then added, "except so far as you may think their conduct on this occasion shows unfitness." *Held*, that the defendant had good ground of exception.

A person is a passenger if a street car has stopped for him and he is in the act of getting aboard when the car starts.

If a person first attempts to get upon a street car after it has started, the question whether he was negligent is for the jury, in an action for injuries caused by being thrown from the car.

TWO ACTIONS OF TORT, by the administrator of the estate of James P. Gordon, the first being for personal injuries sustained by the intestate through the alleged negligence of the defendant; and the second being under St. 1886, c. 140, for causing his death as a result of the same accident. At the trial of the cases together, before *Bishop*, J., the jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions. The facts appear in the opinion.

M. F. Dickinson, Jr. & W. B. Farr, for the defendant.

H. M. Williams, (*H. H. Sprague* with him,) for the plaintiff.

HOLMES, C. J. The first of these actions is brought to recover damages for personal injuries to the plaintiff's intestate, and the second to recover the statutory damages for causing his death by the same accident. St. 1886, c. 140. At the trial there was evidence that the deceased and his wife had stopped an open car of the defendant's; that his wife got upon it, and that the deceased had got one foot upon the running-board in the act of getting in when the conductor gave the signal to start, and the

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deceased was thrown to the ground. His left thigh-bone was broken, and he afterwards died from his injuries. The case is here on exceptions. It is argued that the testimony which gave the foregoing account of the accident was contradictory and contradicted, and that the case should have been taken from the jury. Of course we have nothing to do with that aspect of the case, so far as it concerns the action for injuries, and we give it no more attention. But the action for the penalty under the statute must be based on the unfitness or gross negligence of the defendant's servants; and the question whether there was any evidence of either was raised by separate requests for specific rulings as well as by the general request for a ruling that the plaintiff could not recover.

With regard to gross negligence we are not prepared to say that the jury were not warranted in finding it. The conductor must have known that the car had been stopped for the purpose of taking on passengers. It was his business to know whether those who wished to board the car had done so, and had got so far in as to make it safe to start. As a fact he was where he could see. He might be found to have seen also that the deceased was old and feeble, as the witnesses described him, which would give a special reason for care. We cannot say what the jury found to have been the precise position of the deceased when the car was started. But it was possible on the evidence to find that he was just in that unstable equilibrium which would make a start very dangerous for a man of seventy-four, and that the conductor knew it, or recklessly took the chances.

But the judge also was asked to rule in the action under the statute for causing death that there was no evidence that the deceased lost his life by reason of the unfitness of the servants of the defendant. His instruction was that there was no such evidence "except so far as you may think their conduct on this occasion shows unfitness." Very probably he meant no more than what is true, that such evidence tends, as far as it goes, to show unfitness, so that coupled with other competent evidence it might warrant the finding. *Olsen* v. *Andrews*, 168 Mass. 261. But we fear that the jury must have understood that they were warranted in finding unfitness from this evidence alone, which is not the law. It is clear, as a matter of common sense and on

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authority, that a single act of starting an electric car too quickly, without more, would not warrant any general inference as to the competence of a conductor. *Peaslee* v. *Fitchburg Railroad*, 152 Mass. 155, 158. For this reason the exceptions must be sustained.

The judge was right in his ruling as to the deceased being a passenger. He was a passenger if the car had stopped for him and he was in the act of getting aboard when the car started. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227, 232. *Brien* v. *Bennett*, 8 C. & P. 724. *Ganiard* v. *Rochester City & Brighton Railroad*, 50 Hun, 22; *S. C.* 121 N. Y. 661. *Smith* v. *St. Paul City Railway*, 32 Minn. 1.

If the plaintiff's intestate first attempted to get upon the car after it had started, the question whether he was negligent was for the jury. *Corlin* v. *West End Street Railway*, 154 Mass. 197.

Exceptions overruled in the first case and sustained in the second.

MALCOLM CAMPBELL *vs.* CHARLES E. DEARBORN.

Suffolk. November 16, 1899. — January 5, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Due Care — Negligence — Assumption of Risk — Employers' Liability Act — Evidence.

At the trial of an action for personal injuries, it appeared that the plaintiff was employed in the defendant's lumber yard, had worked there for ten or eleven years, and was experienced in the business; that he was at work on top of one of the piles of lumber, toward the rear, when the end of the board on which he stood sank under his weight, probably by reason of its having a shorter board underneath it, and that the boards in the pile were laid so that their ends were even on the front of the pile; but, as the boards were of different lengths, the rear of the pile was uneven, the longer boards projecting over the shorter ones. The plaintiff testified that he thought all the planks under the place where he was standing were long, although he knew that the pile was determined by the width not by the length of the boards, knew generally that boards of different lengths were put in the same pile, and seemingly knew that there were boards of different lengths in this pile. *Held*, that the plaintiff assumed the risk, that a pile of boards is not ways, works, or machinery, within the employers' liability act, St. 1887, c. 270, and that this opinion as to the defendant's duty made certain evidence immaterial.

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TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ by reason of the defendant's alleged negligence in the piling of a lot of lumber. The declaration contained two counts, the first at common law, and the second under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Hardy*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

G. L. Wilson, for the plaintiff.

S. H. Tyng, for the defendant.

HOLMES, C. J. This is an action for personal injuries, which comes here upon exceptions to a ruling that the plaintiff was not entitled to go to the jury. The plaintiff was employed in the defendant's lumber yard, and had worked there for ten or eleven years. Of course he was experienced in the business. He was at work on top of one of the piles of lumber, toward the rear, when the end of the board on which he stood sank under his weight, probably by reason of its having a shorter board underneath it. The boards in the pile were laid so that their ends were even on the front of the pile; but, as the boards were of different lengths, the rear of the pile was uneven, the longer boards projecting over the shorter ones. These seem to be all the facts necessary to be stated, except that the plaintiff testified that he thought all the planks under the place where he was standing were long, although he knew that the pile was determined by the width not by the length of the boards, knew generally that boards of different lengths were put in the same pile, and seemingly knew that there were boards of different lengths in this pile.

We are of opinion that the ruling was right. If the cause of the accident was not conjectural, it was, as we have said, the fact that a longer board lay upon a shorter one. This was one of the risks of the business in which the plaintiff engaged. The boards came and went, sometimes they were longer and sometimes shorter, but they all had to go upon the pile. In our opinion, whether the duty of an employer to take reasonable care to secure the safety of his employees while at their work is regarded as a duty with reference to the character of the place where they work, or as one which goes no further than to re-

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quire notice of the danger to the employees, no failure to perform it on the part of the defendant is made out. He had a right to pile the boards in the way he did, and he had a right to assume that the plaintiff would anticipate and look out for their being piled in that way. If he had told the plaintiff to look out for such a possibility, he would not have been liable for the accident. But the plaintiff knew, or ought to have known, the danger as well as he, and therefore to have told him would have been an empty form. We should add that we think it plain that a pile of boards is not ways, works, or machinery within St. 1887, c. 270, § 1. See *Lynch* v. *Allyn*, 160 Mass. 248.

The opinion which we entertain about the defendant's duty makes what may have been usual in other yards and the other questions of evidence immaterial. See *Maynard* v. *Buck*, 100 Mass. 40, 47, 48; *McMahon* v. *McHale*, 174 Mass. 320; *Janvrin, petitioner*, 174 Mass. 514, 518; *Grand Trunk Railroad* v. *Richardson*, 91 U. S. 454, 469, 470; *Wabash Railway* v. *McDaniels*, 107 U. S. 454, 460, 461. *Exceptions overruled.*

ALBERT WETHERBEE & another *vs.* WILLIAM H. PARTRIDGE.

Suffolk. November 17, 1899. — January 5, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Injury to Property caused by blasting Rocks on adjoining Land — Independent Contractor.

At the trial of an action for injuries to the plaintiff's property by the blasting of rocks upon adjoining land of the defendant, the defence relied on was that the work was in the hands of an independent contractor. The contract contemplated that blasting would be done, and the place where it was done was within three or four feet of the line between the plaintiff's and the defendant's land, and about eight or nine feet from the plaintiff's house. *Held*, that it was plain that performance of the contract would do the damage complained of unless it was guarded against, and that the defendant was bound to see that due care was used to prevent harm.

TORT, for injury to the plaintiffs' building by the blasting of rocks on adjoining land of the defendant. Trial in the Superior

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Court, before *Bond*, J., who, at the close of the evidence, refused to give the following rulings requested by the defendant, and he excepted. 1. Upon all the evidence in the case the plaintiffs are not entitled to recover as matter of law. 2. The owner of real estate is not liable for the acts of an independent contractor under the conditions testified to, upon all the evidence in this case, and a verdict should be ordered for the defendant as matter of law.

J. P. Leahy, (*J. C. Pelletier* with him,) for the defendant.

G. H. Mellen, for the plaintiffs.

HOLMES, C. J. This is an action of tort to recover damages for an injury to the plaintiffs' property by the blasting of rocks upon adjoining land of the defendant. The defence relied on is that the work was in the hands of an independent contractor, and the question raised by the exceptions is whether that fact entitled the defendant to have a verdict directed in his favor. It may be assumed that the contract contemplated that blasting would be done, and the place where it was done was within three or four feet of the line between the plaintiffs and the defendant, and about eight or nine feet from the plaintiffs' house. Under such circumstances, it was plain that the performance of the contract would bring to pass the wrongful consequences of which the plaintiffs complain, unless it was guarded against, and if the principle recognized in *Woodman* v. *Metropolitan Railroad*, 149 Mass. 335, 340, applies, the defendant was bound to see that due care was used to prevent harm.

We are of opinion that the principle does apply. In some cases of blasting under an independent contract we might go no further than to hold that there was a question for the jury whether the danger was so great as to make the defendant liable. But in the case at bar the danger was so obvious that only one conclusion was possible, and the defendant did not ask to go to the jury upon this point. What he wanted was to have a verdict directed in his favor. Cases sustaining the conclusion to which we have come are *Joliet* v. *Harwood*, 86 Ill. 110; *James* v. *McMinimy*, 93 Ky. 471; *Norwalk Gaslight Co.* v. *Norwalk*, 63 Conn. 495. There are some other cases in which the subject has been approached solely from the point of view of master and servant, although not without dissent. These decisions we are

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not prepared to follow. *McCafferty* v. *Spuyten Duyvil & Port Morris Railroad*, 61 N. Y. 178, 185. *Tibbetts* v. *Knox & Lincoln Railroad*, 62 Maine, 437. *Edmundson* v. *Pittsburgh, McKeesport, & Youghiogheny Railroad*, 111 Penn. St. 316. Compare *Stone* v. *Cheshire Railroad*, 19 N. H. 427; *Wright* v. *Holbrook*, 52 N. H. 120, 126. *Exceptions overruled.*

GEORGE H. GOODHUE *vs.* HARTFORD FIRE INSURANCE COMPANY.

Suffolk. November 21, 1899. — January 5, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Fire Insurance — Declaration — Demurrer — Assent of Insurer to Removal of Property.

The ground that counts of a declaration are inconsistent with each other is not the same as the ground of misjoinder of counts, and Pub. Sts. c. 167, § 67, do not apply.

The first count of a declaration alleged a written policy of insurance upon goods in a certain place, with a condition against removal, a waiver of the condition, a removal of the goods to another place consented to, and a loss. The second count alleged a "surrender" of the policy at the defendant's request that it might be modified so as to cover the goods in the new place, an agreement to insure until the policy was modified, and a loss before the modification was made. The third count alleged a waiver of the condition against removal and an agreement that "until modification thereof" the policy should attach to the goods until all stored in their new place, and a further agreement thereafter to attach a permanent modification to the policy; and that the policy was delivered to the defendant, which, in violation of its agreement, modified the policy so that it covered a part only of the goods, and thereby cancelled the policy as to the other goods. *Held*, on demurrer, that the counts were not inconsistent.

Upon an appeal from the judgment of the Superior Court on a demurrer to a declaration, this court will not affirm the judgment upon a ground contended for different from that assigned for the judgment, without giving the plaintiff the same opportunity to amend his declaration which he would have had in the Superior Court, if the argument addressed to this court had prevailed there.

It is not necessary that the declaration in an action upon a policy of fire insurance in the standard form should allege that the assent of the defendant to the removal of the insured property was in writing.

CONTRACT, in three counts, upon a policy of insurance against loss by fire. The defendant demurred to the declaration, assigning various grounds of demurrer. In the Superior Court the

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demurrer was sustained, "on the fourth ground that the several counts are inconsistent with each other," and judgment ordered for the defendant; and the plaintiff appealed to this court. The facts appear in the opinion.

W. R. Sears, for the plaintiff.

J. D. Bryant, for the defendant.

HOLMES, C. J. This is an appeal from a judgment by the Superior Court for the defendant upon demurrer to the plaintiff's declaration. An objection is taken at the outset that an appeal does not lie because the decision of the Superior Court concerns only the misjoinder of counts and therefore is final by Pub. Sts. c. 167, § 67. The papers sent up to us contain the statement that the demurrer is sustained upon the fourth ground, which is that the several counts are inconsistent with each other, and the objection is founded upon this statement. It is unnecessary to consider whether the statement is properly part of the record, or whether, if it is, the statement or the scope of the whole demurrer is to determine the right of appeal, because we are of opinion that the ground that the counts are inconsistent with each other is not the same as the ground of misjoinder, and therefore § 67 above referred to does not apply. The true scope of § 67 is shown by reference to § 12 of the same chapter, although that section may not give all the cases of misjoinder.

We are of the opinion that the counts are not contradictory. There is no allegation that they are for the same cause of action as there was in *Mullaly* v. *Austin*, 97 Mass. 30, 31, 33, and *Dows* v. *Swett*, 127 Mass. 364. If the second and third counts had alleged the issuing of a certain other policy of insurance, there would have been no question of contradiction even though they had referred to the same document as a copy of the contract. We should be disposed to interpret the counts in that sense, if necessary to save them from an objection so purely formal. In point of substance it was natural and proper that the plaintiff should state his cause of action in as many different ways as he conceived that there were different views possible of the legal operation of the facts. *Little* v. *Blunt*, 13 Pick. 473, 476. *Beauregard* v. *Webb Granite & Construction Co.* 160 Mass. 201, 202.

But assuming that it appears that the counts all refer to the same original policy of insurance, we think them not inconsist-

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ent, when read, as we read pleadings, with a rational effort to find out what they mean. The first alleges a written policy of insurance upon goods in a certain place with a condition against removal, a waiver of the condition, a removal of the goods to another place consented to, and a loss. The second alleges a "surrender" of the policy at the defendant's request that it might be modified so as to cover the goods in the new place, an agreement to insure until the policy was modified, and a loss before the modification was made. Surrender plainly means only a handing over of the document to the defendant for the purpose of modification, but the count is on a subsidiary and temporary contract. This is consistent with the waiver alleged in the first, although probably the same facts would be relied on in evidence to establish the one, the other, or both. The third count, like the first, alleges a waiver of the condition against removal, and an agreement that "without modification thereof" the policy should attach to the goods until all stored in their new place; and a further agreement thereafter to attach a permanent modification to the policy. Of course the words "without modification thereof" just quoted mean without physical change of the instrument, which, as stated, was to be made later when the goods all had been moved. So far we have the first count over again in a little different form. The count further alleges that the policy was delivered to the defendant, and that the defendant, in violation of its agreement, modified the policy so that it covered a part only of the goods and thereby cancelled the policy as to the other goods. This accounts in advance for the condition of the instrument. The words "modified" and "cancelled" refer plainly to the physical changes made and the effect which those changes would have had if authorized, and makes the count a count on the original policy with a waiver, irrespective of certain words which the defendant without right has seen fit to write into it.

The defendant, while contending that the judgment of the Superior Court cannot be reviewed here because of the ground on which it went, nevertheless undertakes to sustain that judgment upon other grounds peculiar to the several counts. If such arguments are open, and we should be of opinion that they were good, we should not affirm the judgment without giving the

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plaintiff an opportunity to amend, such as he would have had in the Superior Court if they had prevailed there. Pub. Sts. c. 167, § 67. It would be most unjust to affirm a judgment upon different grounds, and cut the plaintiff off without giving him the chance that he would have had in the lower court to consider whether he could better his case.

Assuming without deciding that the demurrers to the several counts are open here, the only objection to the first and third counts which we think requires notice is, that the assent of the defendant to the removal of the property is not alleged to have been in writing, whereas the standard form of policy provides that it shall be void "if without such assent," which we take to mean assent in writing, "the said property shall be removed," with immaterial exceptions. We must adhere to the general rule laid down in *Bartlett* v. *Stanchfield*, 148 Mass. 394, 395, that parties cannot tie up by contract their freedom of dealing with each other, whether that rule be or be not consistent with *Minturn* v. *Manufacturers' Ins. Co.* 10 Gray, 501, 508. But in this case the attempt thus to limit future action has whatever legislative sanction may be implied by its insertion in the statutory form, and certainly there is force in the argument that it was intended to make it impossible for a jury to render the description of the place and the condition in support of it nugatory, going as it does to the essence of the risk. See *Burghardt* v. *Owen*, 13 Gray, 300, 302. We do not think it proper to express a final opinion upon this point now, because, even if the defendant is right in its law, we think the rule of pleading applicable which is applied to contracts within the statute of frauds. *Price* v. *Weaver*, 13 Gray, 272. Apart from statute, the waiver of the condition by word of mouth, or indeed any subsequent oral modification of the contract, could be shown, and could be shown too without encountering the difficulties of substantive law and of pleading which have embarrassed, and still embarrass, counsel in cases within the statute of frauds. *Cummings* v. *Arnold*, 3 Met. 486. *King* v. *Faist*, 161 Mass. 449, 456. If, as is probable, a waiver of the terms as to place is a change going so far to the essence of the contract that it would have to be pleaded, still it might be pleaded without alleging a writing, whatever the contract affected to require. The establish-

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ment of the standard form of policy does not change the rules of pleading, and a declaration which would have been good before in the respect under consideration is good still.

It was suggested for its bearing upon various parts of the case that the statutes now imply that all insurance shall be in writing. St. 1894, c. 522, § 59. Pub. Sts. c. 119, § 138. The contrary is settled, at least with regard to temporary contracts such as is alleged in the second count. *Sanford* v. *Orient Ins. Co.* 174 Mass. 416.

The other criticisms of detail do not seem to us to need mention. *Demurrer overruled.*

CHARLES S. FORBES & another *vs.* FRANKLIN P. DOUGLASS, administrator.

Worcester. November 22, 1899. — January 5, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Estates of Persons Deceased — Administrator and Heir — Decree against Latter as Adjudication against Former — Answer.

A decree, dismissing a suit in equity brought by the heirs of a deceased person to set aside a contract made by him, on the grounds of insanity and fraud, to which suit the administrator of his estate is not a party, is not an adjudication which will bind the administrator, in an action against him upon such contract, the defences to which are insanity and fraud; and the pendency at that time of the suit in equity is not a material fact to be alleged in the answer to the action, and the allegation cannot affect in any way the defendant's rights.

CONTRACT, against the administrator of the estate of Alfred W. Wilcox, for breach of an agreement contained in a deed of land in Worcester from the plaintiffs to the intestate. Trial in the Superior Court, before *Hopkins*, J., who directed the jury to return a verdict for the plaintiffs; and, the defendant having excepted, at his request, reported the case for the determination of this court. If the rulings were right, judgment was to be entered on the verdict; otherwise, the case was to be remitted for a new trial. The facts appear in the opinion.

F. P. Goulding, (*E. F. Thompson* with him,) for the defendant.

H. Parker, for the plaintiffs.

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HOLMES, C. J. This is an action upon a contract made by the defendant's intestate as one of the elements in a sale and exchange of lands. The defendant set up the insanity of his intestate, and that the transaction was fraudulent. At the trial the plaintiff produced the record of a suit in equity, brought by the heirs of the defendant's intestate to set aside the bargain, and dismissed, as we assume to have been proved sufficiently, on the ground that insanity and fraud were not made out. The judge admitted the record and ruled that it was an adjudication against the defendant. This ruling was excepted to and is before us on a report.

The defendant was not a party to the suit in equity, and therefore the inquiry would seem to be rather for grounds upon which the decree could bind him than for arguments against its doing so. The fact that he ought to have been made a party if a rescission of the whole transaction of his intestate was sought for, (*Wilcox* v. *Forbes*, 173 Mass. 63, 65,) does not make the decree more effectual against him than against any other stranger. A decree does not bind strangers merely because they ought to have been given a chance to be heard. The defendant does not claim through the heirs but rather paramount to them, so far as he and they have claims to the same property. For the most part their rights and obligations are different. Executors and administrators, although their rights and liabilities are carved in the main from what once was the province of heirs, represent different interests, not that of distributees merely, but that of creditors. It is true that administrator and heir both derive their rights from the deceased, that both in their several spheres represent his person, and that in some cases where the right or liability is primarily that of the administrator his act may affect the rights of the heir. *Bullard* v. *Moor*, 158 Mass. 418, 425. So in some cases a judgment for or against the administrator may bind the heir and in some cases not. *Walsh* v. *Packard*, 165 Mass. 189, 192. *Thayer* v. *Hollis*, 8 Met. 369. See cases below. But these cases go on special reasons and afford no general ground for the converse and much broader proposition that the administrator is bound by whatever binds the heir. As we can think of no ground which furnishes even an argument for such a rule, we content ourselves with stating our opinion that

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the general principle must prevail, and that the defendant was not bound or affected by a decree in a suit to which he was not a party and in which he never was named or heard. *Dorr* v. *Stockdale*, 19 Iowa, 269. See *Stone* v. *Wood*, 16 Ill. 177; *Wilson* v. *Kelly*, 19 S. C. 160; *Watts* v. *Taylor*, 80 Va. 627, 632; *Curry* v. *Peebles*, 83 Ala. 225, 227; *Ferguson* v. *Broome*, 1 Bradf. 10. The only cases which we have seen that need mention as looking at all the other way are *Molton* v. *Miller*, 3 Hawks, 490, 498, and *Hardaway* v. *Drummond*, 27 Ga. 221. The former held a judgment in ejectment against heirs conclusive in a subsequent action against an administrator for mesne profits. This went on the words of a statute and on the fact that the heirs represented the principal interest, neither of which facts exists in the present case. The latter contains a dictum that an administrator cannot recover property for the benefit of heirs when they are barred. This also is not shown to have any application.

At the time when the answer was filed the suit in equity was pending, and the fact that it was pending was alleged. We do not perceive its materiality to the answer, or how the allegation should affect in any way the defendant's rights.

It seems not unlikely that there was a mistake as to the rule of damages in not allowing a deduction of the amount realized on foreclosure of the mortgage. But as the facts are not very clear and the question may not arise again, we do not go into it.

Case remitted for new trial.

RUFUS H. ORNE & another *vs.* WILLIAM N. BARSTOW.

Middlesex. November 23, 24, 1899. — January 5, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Mechanic's Lien — Time of Filing Statement of Lien — Certificate and Conduct of Register of Deeds.

A person went to the registry of deeds with a statement of a mechanic's lien to be filed, within one hour after the usual time for closing the office on Saturday afternoon, which was the last day of the time allowed for filing such statements by Pub. Sts. c. 191, § 6. He got into the office after it was closed, tendered the

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statement and the fee to the register, who was there, but refused to receive it. By the register's suggestion, he put the statement and fee into an envelope which the register gave him, went outside of the office and pushed the envelope under the closed door, through the glass panel of which he was watched by a clerk. The envelope was on the register's desk on Monday morning, and the statement was marked as filed on that day. *Held*, that the statement was filed on Saturday afternoon.

It seems, that the certificate of a register of deeds is conclusive as to the time of filing an instrument, but may be amended by him.

PETITION to enforce a mechanic's lien, under Pub. Sts. c. 191. Trial in the Superior Court, without a jury, before *Dewey*, J., who ordered that the petition be dismissed; and the petitioners alleged exceptions. The facts appear in the opinion.

J. J. Higgins, for the petitioners.

H. D. Moore & G. E. Jacobs, for the respondent.

HOLMES, C. J. This is a petition to enforce a mechanic's lien. At the trial the copy of the statement put in evidence by the petitioners bore the indorsement "A copy of mechanic's lien, filed with Middlesex So. District Registry of Deeds, Feb. 14, 1898, at 8 h. 0 m. A. M. Recorded book 2633, page 521. Attest: Thos. Leighton Jr. Ass't Register." It is agreed that this was not within the thirty days allowed for filing such statements by Pub. Sts. c. 191, § 6, but evidence was admitted which showed the following facts. The office hours of the registry on Saturdays were from 8 A. M. to 1 P. M. On Saturday, February 12, which was within the thirty days, between half past one and two, P. M., the petitioners' attorney, having got into the office after it was closed, tendered the statement and the fee to the register, who was there but refused to receive it. By the register's suggestion the attorney thereupon put the statement and fee into an envelope which the register gave him, was escorted to the door by a clerk, and after the door was closed pushed the envelope under the door. He was watched through a glass panel by the clerk, and the fair inference is that the clerk took the envelope, which was on the register's desk on Monday morning. The court ruled not only that the certificate of the register as to the time of filing was conclusive, but also that what was done by the attorney did not amount to a filing; and the case is here on exceptions.

There is no doubt that the register's certificate was evidence, if

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not conclusive evidence, of the time of filing. *Wood* v. *Simons*, 110 Mass. 116. *Fuller* v. *Cunningham*, 105 Mass. 442. The statement was left for record. Pub. Sts. c. 191, § 7. The register was required to note the time of reception, and every instrument is considered as recorded at the time so noted. Pub. Sts. c. 24, § 15. The register is also to certify the time upon the instrument. Pub. Sts. c. 24, § 21. We do not think that the statutes mean to distinguish between receiving, recording, and filing, so far as this case is concerned. We perceive no inconsistency in principle with these general provisions in Pub. Sts. c. 147, § 12, and c. 192, § 4, by which certain instruments are to be considered as recorded at the time when left for the purpose in the clerk's office. It is assumed that the time of leaving and the time noted are the same, or, in other words, that the clerk will note the true time. But the last named sections refer to different instruments and to city or town clerks, and do not affect the present case. Neither do we see anything adverse to the conclusiveness of the register's certificate in decisions that a court is not prevented by its own record, which it has power to correct if erroneous, from looking into the facts as to when a petition was filed. *Goulding* v. *Smith*, 114 Mass. 487, 489. *Clemens Electrical Manuf. Co.* v. *Walton*, 168 Mass. 304.

But in the case at bar the parties very properly avoided raising a question as to the conduct of a register who meant to do his duty (*Tracy* v. *Jenks*, 15 Pick. 465, 468,) by going into the facts, and the judge ruled upon them irrespective of the question whether the certificate was conclusive as it stood. If the judge had ruled that the facts did amount to a filing, and the ruling had been accepted by the parties, undoubtedly the register would have amended his certificate so as to avoid concluding the petitioners under the other ruling of the judge. At least there was such a possibility that the register might amend that we cannot treat the ruling as immaterial on the ground that, however the facts might be, the petitioners could not contradict the register's certificate as to the time. It was not argued that the register would not have power to amend under the same conditions as those on which other officers may amend records. See *Baldwin* v. *Marshall*, 2 Humph. 116; *Sellers* v. *Sellers*, 98 N. C. 13, 18, 19.

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We are of opinion that, on the facts proved, the statement was filed on Saturday afternoon. We shall go no further in our decision than this case requires. We shall not undertake to decide whether the register had a right, under Pub. Sts. c. 24, § 12, to close his office as early as he did, so far as to exonerate himself from liability had some one come to the office and found it empty. But he was there. With his knowledge and assent the instrument was left within the enclosure of the office or its approach, for the purpose of being recorded. It was taken into his custody by his servants or agents. He undertook to refuse legal effect to the deposit, it is true, but in our opinion that was beyond his power. It was the petitioners' right, if they found the register in his office on a week day and during daylight, to insist on their statement being filed forthwith, and it is no answer to say that the register might have been absent without liability under the law. As the petitioners did all that they could do, or were bound to do, the register's conduct did not affect their rights. See *Sykes* v. *Keating*, 118 Mass. 517, 519; *Watkins* v. *Bugge*, 56 Neb. 615; *Dodge* v. *Potter*, 18 Barb. 193, 202. *Exceptions sustained.*

ATTORNEY GENERAL *vs.* EQUITABLE ACCIDENT INSURANCE ASSOCIATION.

Suffolk. December 6, 1899. — January 5, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Assessment Insurance — "Accrued Claims" — Emergency Fund.

A person was insured in an assessment insurance company against loss of time by reason of accidental bodily injuries at a certain rate per week, or, in case of death resulting from the injuries within ninety days thereafter, for a stated sum. He received accidental bodily injuries on June 28, and died as a result thereof on August 31; a receiver of the company having been appointed in the interim on August 12, on a bill filed August 9. Section 14 of St. 1890, c. 421, provides that in case of insolvency any unexpended portion of the emergency fund is to be first applied in the payment of "accrued claims." *Held*, that the claim for death was not an accrued claim, and that claims for disability were divisible and had accrued only to the time of the filing of the bill.

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PETITION for instructions by the receiver of the Equitable Accident Association, setting forth the insolvency of the association, the bill filed against it on August 9, 1898, for the appointment of the receiver, the receiver's appointment on August 12, 1898, the casualty insurance business carried on by the association, as defined in St. 1890, c. 421, entitled "An Act relating to assessment insurance," insuring persons against loss of time by reason of accidental bodily injuries, at a certain rate per week during the continuance of disability, not to exceed fifty-two weeks; or, in case of death resulting from said injuries within ninety days thereafter, to pay a stated sum, being the face of the policy, to the beneficiary therein named.

Section 14 of said chapter provides that in the event of insolvency the receiver is to administer any unexpended portion of the emergency fund, "first, in the payment of accrued claims upon certificates or policies."

One Caroline E. Bill, the intervening petitioner, was a creditor of the association, as a beneficiary, upon a death claim upon a policy issued to Frederic A. Bill, and her claim had been allowed by the receiver as an accrued claim under § 14 of the above statute, the death having occurred prior to the date of the filing of the bill for the receiver.

One Hannah J. West, as beneficiary under a policy issued to Walter H. West, who received accidental injuries on June 28, 1898, and died as a result thereof August 31, twenty-two days after the bill was filed, presented a claim to the receiver for the full death claim of $5,000 under the policy to be allowed by him as an accrued claim within the meaning of the statute.

The receiver allowed it as a claim, but not as an accrued claim under the statute, the petitioner opposing its allowance as an accrued claim. The amount of the emergency fund in the receiver's hands is insufficient to pay all accrued claims in full.

Holmes, C. J., reported the case for the consideration of the full court.

W. Keyes, for the receiver, read the papers in the case.

J. H. Appleton, for Caroline E. Bill.

F. S. Hesseltine, for Hannah J. West.

HOLMES, C. J. It may be assumed that the time when the bill was filed, namely, August 9, 1898, is the time at which the

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claims must have accrued in order to come within St. 1894, c. 421, § 14. *Attorney General* v. *Massachusetts Benefit Life Association*, 171 Mass. 193, 194.

1. At that time the accident had happened which resulted in the death of West, and it is contended that the claim had accrued, although the death did not occur until August 31. It is argued that the insurance is "against bodily injuries," that the liability arose with the injury, and that all that happened afterwards was simply the inevitable process of mechanical cause and effect, as theoretically certain from the beginning as an eclipse, — conditions of an action, perhaps, but not of liability. We are unable to agree to the argument. The contract is not a general undertaking to pay for bodily injuries, notwithstanding the introductory words. It is only an insurance against them "in the manner following," namely, an undertaking to pay so much for loss of time on certain conditions, so much for loss of a hand, so much for death, etc. The time or the hand must be lost, or the death must have happened, before the company's obligation to pay arises. That it is theoretically certain to happen is not enough, either by the words of the policy or the reason of the thing. If theoretic certainty were enough, the same reasoning might regard the claim as accrued from the making of the policy, or, if we reject free will, from the beginning of the world. The law does not trouble itself very much with such philosophic difficulties. The practical uncertainty arising from the ignorance of men is enough to be uncertainty in its eyes. A policy of insurance, or a wager, is good, so far as this objection goes, upon a future event depending upon purely mechanical sequences, or, for the matter of that, upon a fact in the past. Striking a mortal blow does not get its character at common law, as murder or otherwise, until the death has happened within or beyond the year and day. 4 Bl. Com. 197, 198. If the theoretic certainty of the event gave character to the act, the length of time before it came to pass would make no difference. No claim had accrued for the death of West on August 9, because he had not died on that day, and it was not legally certain that he would die because of his accident, supposing that that would have been enough, which the decisions indicate that it would not have been. See *People* v. *Commercial*

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Alliance Ins. Co. 154 N. Y. 95; *Mayer* v. *Attorney General*, 5 Stew. 815, 823; *In re Educational Endowment Association*, 56 Minn. 171.

2. On the principle and analogy above stated, we are of opinion that the claims for disability have accrued only to the time of the filing of the bill. A claim of this sort does not accrue as a whole. It is not one from the beginning. See *May* v. *Gloucester*, 174 Mass. 583. *Decree accordingly.*

MARIA E. BENNETT & others *vs.* JENNIE M. KIMBALL.

Suffolk. December 13, 1899. — January 5, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Power of Equity Court to enjoin Administrators — Jurisdiction of Probate Court.

An administrator is not to be enjoined from performing his duties by an equity court on the ground that his appointment ought to be revoked. The remedy is by probate proceedings.

PETITION IN EQUITY, to the judge of the Probate Court, praying that the respondent's appointment as administratrix of the estate of Oliver S. Foster be declared void, the letter of administration cancelled, an injunction issued, and a receiver or some other similar official appointed. The respondent demurred, assigning as ground therefor that "the petitioners have a plain, adequate, and complete remedy at law by petition to vacate said appointment and said decree of the Probate Court appointing the respondent administratrix is conclusive, and cannot be set aside in equity." The demurrer was sustained, and the petitioners appealed to this court. The decree sustaining the demurrer was affirmed, the bill was dismissed without prejudice, and the case was remitted to the Probate Court for further proceedings. The petitioners appealed to the full court.

W. H. B. Cotton & W. R. Sears, for the petitioners.

A. Hemenway, (*W. F. Kimball* with him,) for the respondent.

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HOLMES, C. J. The jurisdiction in equity given to the probate courts by St. 1891, c. 415, § 1, is a jurisdiction concurrent with that of other equity courts. Therefore the equitable relief sought in this case may be tested by supposing the bill to have been brought in the Superior Court. The difficulty then becomes manifest that a court of equity is asked to interfere with the performance of his duties by an officer appointed by another court, on the ground that it is hoped that hereafter the latter court may reverse its action and revoke the appointment. Ordinarily when an injunction is granted, on the ground, for instance, that a case is stated in the bill for a conveyance, the final relief which is expected later is to be given by the same court and in the same proceeding, and the injunction issues on the footing that a probability of such further action is made out sufficiently to justify preserving the present condition of things in the meantime.

But supposing this difficulty not to be conclusive, as stated, we are of opinion that it becomes so when taken in connection with the relief that can be had through the regular probate channel. If the bond is not sufficient a surety can be asked for, and the penal sum increased at once, before acting on the question of the respondent's removal. Pub. Sts. c. 143, § 5. It seems to us better that the responsibility of the Probate Court for making proper appointments, and securing those interested against the misconduct of its appointees, should not be interfered with or divided. It is true that this petition was an application to the probate judge. But an application in equity to the probate judge for equitable relief stands like a bill in equity in other courts, and cannot be helped out by considering his powers in another capacity. As we have remarked already, his jurisdiction in equity is concurrent.

It follows from what we have said that if this be regarded as a bill in equity and nothing more, it should be dismissed. If it is an attempt to unite a bill in equity with a probate petition, it equally is bad, because the two proceedings cannot be joined.

Decree affirmed.

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MICHAEL J. CALLAHAN *vs.* CITY OF BOSTON.

Suffolk. December 14, 1899. — January 5, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Labor performed on Public Building — Statute — Constitutional Law.

The St. of 1892, c. 270, entitled "An Act relating to the payment for labor performed on buildings or public works owned by cities or towns," is constitutional.

CONTRACT, under St. 1892, c. 270, entitled "An Act relating to the payment for labor performed on buildings or public works owned by cities or towns." The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, the nature of which appears in the opinion.

S. M. Child, for the defendant.

A. D. Moran & F. P. Curran, for the plaintiff.

HOLMES, C. J. It is not denied that the defendant is liable to the plaintiff under St. 1892, c. 270, if that statute is constitutional. The effect of that act is that if a city or town sees fit voluntarily to order the construction of public works owned by it, then, *nolens volens*, it must assume a part of the responsibility of an employer to the workmen employed by the contractor with whom it deals. It is intended to be a milder application of the principle of the mechanic's lien laws. We see no constitutional objection to the law. It is a familiar type of statute, and has been upheld heretofore. *Hart* v. *Boston, Revere Beach, & Lynn Railroad*, 121 Mass. 510. A compulsory relation of master and servant is not unknown even to the common law. *Benjamin* v. *Dockham*, 134 Mass. 418.

Judgment for the plaintiff.

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COMMONWEALTH *vs.* EDWARD F. RICHARDSON.

Suffolk. November 21, 1899. — January 8, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Indictment — Exceptions — Habitual Criminal — Continuous Imprisonment under previous Commitments.

Exceptions to the refusal to give rulings requested, which relate to the duty of the jury upon all the evidence, will be overruled, if the bill of exceptions states no evidence.

It is no objection to the sufficiency of an indictment under the habitual criminal act, St. 1887, c. 435, that the sentence imposed upon the second previous conviction alleged in the indictment took effect from the expiration of the sentence imposed upon the first previous conviction alleged, so that there was no interval of liberty between the two terms of imprisonment.

INDICTMENT, in two counts, charging the defendant in the first count with breaking and entering the shop of one Andrews in the night time, with intent to commit larceny; and in the second count with receiving stolen property, and also with being an habitual criminal, — two convictions, sentences, and commitments to the State prison of this Commonwealth for terms of not less than three years each being set forth in the indictment.

In the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment. *Blodgett*, J., overruled the motion; and the defendant excepted. At the trial the jury returned a verdict of guilty; and the defendant alleged exceptions. The facts appear in the opinion.

D. H. Coakley & G. T. Emerson, for the defendant.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

BARKER, J. The defendant's bill of exceptions states no evidence, while the requests for rulings, which he now contends in his brief should have been given, relate to the duty of the jury upon all the evidence. Because no evidence is stated, this exception is overruled. His exception to the order overruling his motion to quash the indictment raises the question of its sufficiency, and of the construction of St. 1887, c. 435, he having been convicted and sentenced as an habitual criminal under that act.

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The first section of the statute is as follows: "Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other State, or once in this and once at least in any other State, for terms of not less than three years each, shall, upon conviction of a felony committed in this State after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the State prison for twenty-five years: provided, however, that if the person so convicted shall show to the satisfaction of the court before which such conviction was had that he was released from imprisonment upon either of said sentences, upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this act."

The two previous convictions, sentences, and commitments to prison alleged in the indictment were in this State. The first conviction was at Cambridge, in June, 1890, and on this he was sentenced on June 30, 1890, and on the same day was committed to the State prison in pursuance of the sentence. Pending the execution of this sentence he was convicted of another crime in Boston in July, 1890, and on July 31, 1890, was sentenced to imprisonment for another term, this sentence to take effect from and after the expiration of the first sentence, and on August 1, 1890, he was committed to the State prison in pursuance of the last sentence.

On July 15, 1898, he was discharged from the State prison, having served both of these sentences under the law. The new crimes, which the indictment alleges the prisoner to have committed, are charged to have been committed on February 25, 1899, and it appears from the record that he was found guilty of one of them by the verdict, which also found that before the commission of that offence he had been convicted of crime twice before, and sentenced and committed to prison in this State for terms of imprisonment of not less than three years each.

The charges of the indictment bring the case within the language of the statute taken literally. The defendant is charged with having been convicted twice, sentenced twice, and twice committed to prison for terms of not less than three years each; and with thereafter committing another felony. But he contends that the words of the statute are not to be taken literally, and mean

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that the second previous conviction, sentence, and imprisonment, to meet the true requirement of the statute, must have been for an offence committed after he had served the sentence imposed upon his first conviction, and that to be deemed an habitual criminal he must be shown to have committed an offence after having been twice subjected to discipline by imprisonment, with an interval of liberty between the two terms. In support of this contention he urges that penal statutes are to be construed strictly, in favor of liberty; that all words in the statute must be given reasonable force and meaning, and that the intent must be obtained from a consideration not only of the whole statute, but of all other legislation upon analogous matters; and he particularly relies upon the statement of the purpose and principle of such enactments contained in the opinion of the court in *Commonwealth* v. *Daley*, 4 Gray, 209. The decision in that case was that the second conviction, which, under St. 1852, c. 322, § 7, required an increased penalty, must be for an offence committed since the time of the alleged previous conviction. The opinion, after referring to the fact that provisions had been in force by which persons convicted of offences punished by imprisonment in the State prison were liable to additional punishment upon each successive sentence, says: "The sole object of all such penal enactments is to deter persons from the repeated commission of similar offences, by imposing additional and severer penalties for each successive violation of law; that is, to punish second offences more severely than first, and third more severely than second; and thus, by aggravating the punishment for each successive violation of law, to prevent persons from becoming old and hardened offenders"; and, further, that the principle on which aggravated penalties are prescribed "is that the offender is first to incur the lighter penalty, and be thereby subjected to the discipline which penal enactments are intended to exert upon the violators of law, before he can be liable to incur the more aggravated punishment." The statutes referred to by citations in the opinion are St. 1833, c. 85, cited as c. 83, and Rev. Sts. c. 133, § 16. It is to be noticed that the provisions of Rev. Sts. c. 133, § 16, were part of an amendment made by St. 1836, c. 4, § 17, to continue in force the provisions of St. 1833, c. 85; and also that St. 1852, c. 322, § 7, which the court was

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construing in the opinion from which we have quoted, St. 1833, c. 85, and Rev. Sts. c. 133, §§ 16, 17, and 18, each provided increasingly aggravated penalties upon second and third convictions, while the present statute provides no aggravated penalty for second convictions. There is nothing in the opinion to justify the contention that an aggravated penalty for a third offence committed after two consecutive terms of imprisonment imposed because of two previous distinct convictions is inconsistent with our system of penal legislation. If a person has broken the law for a third time after having been subjected twice to discipline by imprisonment under penal enactments, the Legislature may say that such a third offence shall fix his status as an habitual criminal, notwithstanding the fact that his two terms of discipline were continuous.

A more full investigation than that made in the opinion in *Commonwealth* v. *Daley* shows that the intervention of a period of liberty between terms of imprisonment has not been uniformly a feature of our system of aggravated penalties for repeated offences; and it cannot reasonably be contended to be an indispensable feature of such a system if the Legislature sees fit to order otherwise.

Since the year 1804 a person convicted at one term of three distinct larcenies has been subjected to aggravated punishment as a common and notorious thief. St. 1804, c. 143, § 3. *Ross's case*, 2 Pick. 165, 170. Rev. Sts. c. 126, § 19. Gen. Sts. c. 161, § 22. Pub. Sts. c. 203, § 24. All of these statutes negative the idea that previous discipline by punishment is a prerequisite to liability to the aggravated penalty due to persistence in crime.

A system of aggravated penalties for persons convicted of crime after having been sentenced to imprisonment in a State prison was inaugurated here in the year 1817, and continued in force with modifications until the year 1853. The statutes are St. 1817, c. 176, §§ 5, 6; St. 1827, c. 118, §§ 19, 20; St. 1832, c. 73; St. 1833, c. 85; Rev. Sts. c. 133, § 13, as originally enacted, and c. 144, §§ 34–36; St. 1836, c. 4, §§ 17, 20–22; St. 1843, c. 80; St. 1853, c. 375. Cases arising under this system were decided by this court in *Ross's case*, 2 Pick. 165; *Commonwealth* v. *Phillips*, 11 Pick. 28; *Ex parte Seymour*, 14 Pick. 40; *Ex parte White*, 14 Pick. 90; *Ex parte Stevens*, 14 Pick.

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94; *Commonwealth* v. *Evans*, 16 Pick. 448; *Commonwealth* v. *Getchell*, 16 Pick. 452; *Commonwealth* v. *Mott*, 21 Pick. 492; *Wilde* v. *Commonwealth*, 2 Met. 408; *Plumbly* v. *Commonwealth*, 2 Met. 413; *Evans* v. *Commonwealth*, 3 Met. 453; *Phillips* v. *Commonwealth*, 3 Met. 588.

The scheme of punishment for repetition of offences enacted by St. 1817, c. 176, §§ 5, 6, was that whenever a person convicted of crime punishable by confinement to hard labor for a term of years had "been before sentenced to a like punishment," whether pardoned or not, he should be sentenced to solitary imprisonment not exceeding thirty days, and confinement to hard labor for not more than seven years, in addition to the punishment prescribed by law for the offence for which he was then tried; and if he had "been before twice convicted and sentenced in manner aforesaid," he should be punished by confinement to hard labor for life, and by solitary confinement not exceeding thirty days. As at the time of the trial it might not be known whether the person charged had been convicted before, it was made the duty of the officers of the State prison, when it appeared that a convict received there under sentence had been before so sentenced, to make representation thereof to the Attorney or Solicitor General, who by information or other legal process should make the same known to this court, whose justices should try the charge contained in the information, and, if it appeared to be true, should award against the convict the additional punishment so provided. The statute which enacted these provisions contained others concerning the regulation of the State prison. These regulations were revised by St. 1827, c. 118, which altered and amended §§ 5 and 6 of St. 1817, c. 176, and continued them in force as so amended. The chief alterations were the limitation to the warden of the duty to make the representation that a convict had been sentenced before; the placing upon the county attorney for the county of Suffolk of the duty of bringing the information, and the transfer of the jurisdiction over such informations to the municipal court of the city of Boston. St. 1827, c. 118, §§ 19, 20, 27. The question whether the convictions at one and the same term of court were two convictions within the meaning of these statutes, arose both in this court and in the municipal court, the latter taking the view that they were not, and this court deciding

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on March 14, 1831, that two convictions at the same term were two convictions within the meaning of the statute. *Commonwealth* v. *Phillips*, 11 Pick. 28, 34. *Ex parte Seymour*, 14 Pick. 40. *Phillips* v. *Commonwealth*, 3 Met. 588, 591. This decision is inconsistent with the view that an interval of liberty must intervene between the imprisonment for one offence and the commission of the next. It gave rise to St. 1832, c. 73, providing that there should be two several convictions and sentences to the State prison, and two distinct discharges therefrom to bring the party within the provisions of St. 1817, c. 176, and of St. 1827, c. 118, providing for aggravated punishment. But this statute was repealed the next year by St. 1833, c. 85, so that the construction made by this court was ultimately affirmed by the Legislature. The Commissioners' Report on the Revised Statutes, and the Revised Statutes as enacted, ignored the provisions of St. 1833, c. 85. See Rev. Sts. c. 133, § 13; c. 144, §§ 34–36. But before the Revised Statutes took effect, the Legislature again interposed by St. 1836, c. 4, §§ 17, 20–22, restoring the substance of the language of St. 1817, c. 176, St. 1827, c. 118, and St. 1833, c. 85, to which this court had given a construction under which previous convictions and sentences only need be shown to render the convict liable to aggravated penalties. The statutes remained unchanged in this respect until finally repealed in 1853. See St. 1843, c. 80; St. 1853, c. 375. In the year 1882, this court, dealing with another statute imposing aggravated penalties for repeated offences, Pub. Sts. c. 207, § 27, said, speaking through Morton, C. J., "The object of the statute is to prevent the repeated commission of similar offences by imposing severer penalties for each successive violation of law, and thus to save persons from becoming old and hardened offenders." *Commonwealth* v. *Hughes*, 133 Mass. 496, 497.

As we have seen before, the case of the present defendant is within the letter of the statute. Before he committed the crime for which he is now under sentence as an habitual criminal, he had been convicted twice, and had served out two sentences of imprisonment. Considering with the whole language of the statute the legislation of the Commonwealth upon similar subjects, we think the defendant's case is also within the spirit of

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the statute, as he is one who has persisted in crime notwithstanding the discipline to which he has been subjected in consequence of two former convictions and sentences. If, as we do not now find it necessary to consider or to decide, the language of the statute as to a release from imprisonment upon either of his former sentences upon a pardon implies that both of the former sentences must have been served before the commission of the new offence, the implication goes no further, and furnishes no reason for holding that the statute means that there must have been an interval of liberty between the two former terms of imprisonment.

Exceptions overruled; order overruling the motion to quash affirmed.

MICHAEL FREEMAN, JR. *vs.* CITY OF BOSTON.

Suffolk. January 9, 1900. — January 12, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Land Damages — New Trial — Photograph.

At the trial of a petition for an assessment of the damages caused by taking land near the junction of two streets in a city, the evidence was conflicting as to whether or not the streets were on the same level at such junction. After verdict, the petitioner moved for a new trial, on the ground of newly discovered evidence, and filed with the motion a photograph showing the grades of the locality in question, accompanied by affidavits of the photographer and a civil engineer, stating that the photograph was a correct representation of the locality, and that the grades were on the same level; also other affidavits, stating that the buildings on the petitioner's land had been removed before the time when an expert witness for the respondent testified at the trial that he was inside of them. The judge found that the photograph was discovered after the trial, and that the expert witness was mistaken in his testimony as to when he saw the buildings; and denied the motion. *Held*, that it did not appear that the judge exceeded his powers in refusing a new trial.

PETITION to the Superior Court for a jury to assess the damages caused by the taking of the petitioner's land and the buildings thereon, for the laying out and extension of Columbus Avenue in the respondent city. Trial before *Fessenden*, J., who allowed a bill of exceptions, in substance as follows.

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The petitioner's land was situated on the northwesterly side of Berlin Street, near the southeasterly terminus of Columbus Avenue, as it existed before the extension. The entire parcel of land, with three buildings thereon, was taken by the respondent on January 4, 1895.

At the time of the taking, the southeasterly terminus of Columbus Avenue, near which the land was situated, abutted on the northwesterly terminus of Berlin Street, as it then existed.

The respondent contended, and introduced the plan of the taking and other evidence tending to show, that, at the time of the taking, the surface of Columbus Avenue was at a much higher level than the surface of Berlin Street; that, at the junction of the two streets, the grade of Columbus Avenue was about four feet above the grade of Berlin Street, and Columbus Avenue at the junction terminated abruptly in a steep bank, about four feet above the grade of Berlin Street, obstructing travel and making it difficult for foot passengers and impracticable for teams to pass from one street to the other; and that the petitioner's land, being near such junction, was unfavorably situated with reference to travel along Berlin Street and to and from Columbus Avenue, and was therefore of much less value than the amount the petitioner claimed and the testimony of his witnesses tended to show.

The petitioner contended, and there was evidence in his behalf to show, that, at the time of the taking, Columbus Avenue was practically on the same level as Berlin Street at the point of meeting of the two streets; and that travel from one street to the other was unobstructed both for teams and foot passengers.

The jury returned a verdict for the petitioner in the sum of $12,416.25; and no exceptions were taken by the petitioner.

The petitioner filed two motions for a new trial, the first being for the reasons, among others, that the verdict was against the evidence and the weight of evidence, and against the law; and the second being on the ground of newly discovered evidence. The motions were heard together; and the petitioner, in support of his second motion, filed several affidavits, all in contradiction of material parts of the evidence of James M. Ryan, a witness called by the respondent as an expert, as to his knowledge and experience to guide him as to the value

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of the property in question, as well as to his knowledge of the property.

After the verdict, the petitioner discovered, in the office of Brice S. Evans and Sons, real estate brokers in Boston, a photograph of the exact locality in question, which had been made for them in the autumn of 1894, showing the grades and surface lines of Berlin Street and Columbus Avenue, at and near the junction of the two streets, and the land of the petitioner, as the same existed at the time of the taking.

Upon the finding of the photograph the petitioner duly filed the second motion for a new trial, and filed in support thereof the affidavit of one Folsom stating that he made the photograph; and that at the time it was made the southeasterly end of Columbus Avenue and the northwesterly end of Berlin Street, abutting on the last named end of Columbus Avenue, met at the grade shown in the photograph, and so extended from that point southeasterly for the whole distance, as shown in the photograph; also the affidavit of one Moses, a civil engineer, which stated that in 1893 and 1894, and until the extension of Columbus Avenue was begun, Berlin Street and Columbus Avenue joined at the same grade, and there was no abrupt elevation or depression that could make the beginning and the end of Berlin Street impassable for teams and foot travel; and that the photograph in question was a correct representation of Berlin Street at its junction with Columbus Avenue, and the grades as existing in 1893 and 1894 up to the time of the change were correctly represented by it. He also filed the affidavits of one Sullivan and one Lavin.

At the hearing on the motions for a new trial, the photograph and the affidavits were put in evidence by the petitioner.

The respondent introduced in evidence an unsigned memorandum dated April, 1895, claimed to have been made by Jesse L. Nason, who was called as an expert witness for the respondent at the trial, as to the value of the property taken. It appeared that this paper had been in his possession for some years before the trial.

The evidence at the trial showed that Nason was an important witness for the respondent, and he testified as an expert as to the value of both the land and the buildings as the result of his

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examination of them in October and November, 1895; and also testified that he examined the buildings in question before they were removed in 1895, and took measurements of them; and on cross-examination he testified, "I was inside these buildings in October or November, 1895," and further testified that they were not taken away in August, 1895.

The affidavits of Sullivan and Lavin mentioned above stated that all of the buildings in question were removed before May 1, 1895.

The judge overruled the first motion for a new trial, and made the following findings of fact on the second motion:

1. That the photograph annexed to the affidavit of Folsom was discovered by the petitioner after the verdict.

2. That, if material and competent, Nason, who testified as a witness at the trial, did not see the petitioner's buildings, the value of which was a subject of inquiry at the trial, in August, 1895; that he was mistaken in his testimony as to when he saw the buildings; that he did see and examine them during or before the month of April, 1895; and that he made a written memorandum or report concerning them to the city solicitor of Boston in April, 1895.

The petitioner contended, and asked the judge to rule as matter of law, that, upon the motion, the affidavits, the evidence in the case, and the findings of fact, the petitioner was entitled to a new trial. The judge refused so to rule, and denied the motion for a new trial; and the petitioner alleged exceptions.

C. W. Bartlett, (*E. J. Hadley* with him,) for the petitioner.

T. M. Babson, for the respondent.

HOLMES, C. J. It does not appear that the judge exceeded his powers in refusing a new trial, whether he went on the ground that the newly discovered evidence was only cumulative, or on the ground of its relative importance, or rather unimportance, upon a general view of his whole case. He also may have found that the photograph would be uninstructive and misleading. See *Behan* v. *Williams*, 123 Mass. 366.

Exceptions overruled with double costs.

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MICHAEL GIBBONS *vs.* BRITISH AND NORTH ATLANTIC STEAM NAVIGATION COMPANY.

Suffolk. January 12, 1900. — January 13, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Due Care — Assumption of Risk.

At the trial of an action for personal injuries it appeared that workmen who were fitting up the defendant's vessel with sheep-pens had placed an unfinished trough near a hatch, and that the plaintiff, who was coming up a ladder, took hold of the trough on reaching the hatch and the trough yielded and fell. The trough did not appear to have been put there for the use he made of it. If the evidence showed that the plaintiff's ordinary mode of egress was barred, which was doubtful, it did not appear that he could not get out without using the trough as he did, and even if that had appeared, still he knew that the work was unfinished. *Held*, that the plaintiff relied upon the trough at his own risk.

TORT, for personal injuries, occasioned to the plaintiff, a longshoreman, while employed by one Sullivan, a stevedore, in discharging and loading a steamer; said Sullivan being employed by the defendant company. Trial in the Superior Court, before *Lilley*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

T. H. Buttimer, for the plaintiff.

L. S. Dabney & E. James, for the defendant, were not called upon.

HOLMES, C. J. This is an action of tort for personal injuries. Workmen who were fitting up the defendant's vessel with sheep-pens had placed an unfinished trough near a hatch. The plaintiff coming up a ladder, when he reached the hatch took hold of the unfinished trough, relying upon its being heavy enough or strongly enough fastened for him to trust his weight to it with safety. He was mistaken; the trough yielded and he fell. The judge who tried the case directed a verdict for the defendant, and the case is here on exceptions. We regard the ruling as plainly right. The plaintiff relied upon the trough at his own risk. It did not appear to have been put where it was for the purpose of such use as he made of it. If the evidence shows that the plaintiff's ordinary mode of egress was barred,

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which is doubtful, it does not appear that he could not get out without using the trough as he did; and even if that had appeared, still he knew that the work was unfinished, and that he was not at liberty to assume that that particular part of it had reached such a stage that he could rely upon it as securely fastened. It was not even necessary for him to use that hatch and ladder, but if it had been, he could not hold the defendant liable for his accident. *Exceptions overruled.*

CHARLES E. CUNNINGHAM, administrator, *vs.* GIDEON L. DAVIS & others.

Essex. November 8, 1899. — January 15, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Forcible Entry and Detainer — Guardian ad litem — Discontinuance — Right of Administrator to maintain Action — Mortgage — Foreclosure — Evidence — Payment — Limitation of Action — Instructions.

If, while a case is pending in a police court, the attorney for the other defendants is appointed guardian *ad litem* to represent the interest of an insane defendant, in the absence of anything appearing to the contrary, it may fairly be assumed that in the proceedings in an appellate court he was acting in the same capacity, so far as the interests of that defendant were involved.

It is within the discretion of the judge, in an action on Pub. Sts. c. 175, for forcible entry and detainer, to allow the plaintiff to discontinue as to one of the defendants who is shown by the evidence not to have resided on the premises for several years before the trial.

The administrator *de bonis non* of the estate of a mortgagee of land may maintain an action on Pub. Sts. c. 175, for forcible entry and detainer, when the mortgage has been foreclosed by entry without the exercise of a power of sale.

A mortgage deed more than thirty years old is admissible in evidence without proof of its execution, although a witness is living and in court, and without proof of possession under it.

Upon a witnessed mortgage note, more than twenty years after it was due, was an indorsement signed by the payee of the receipt on a day named of a note for a certain sum, "being balance of the within note and interest to date"; and a new note bearing that date for the sum so named was signed by the mortgagor, payable in six years to the mortgagee, and witnessed. The first note showed no further payments, but there were two indorsements on the second note, the last one being within twenty years of the date of an action on Pub. Sts. c. 175, by the mortgagee to recover possession of the premises. As to this last indorsement the payee's daughter testified that she made it in the maker's presence at

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the request of her mother, to whom the money was claimed to have been paid, the money being then on a table; but she did not testify to the amount of the money, and there was no other evidence that the maker knew the contents of the paper on which the indorsement was made, or that he ever saw it after it was made. A computation of the sum due on the first note showed that the sum named in the last indorsement thereon was a fair statement of the balance; and the second note and the mortgage were kept by the mortgagee. *Held*, that the indorsement on the original note was rightly admitted in evidence; and that the judge was justified in finding that the second note was a renewal of the balance due on the first note, and that the payment last indorsed on the second note was made in part payment of the mortgage debt.

After an entry to foreclose a mortgage, the mortgagor and those claiming under him become tenants at sufferance of the mortgagee, and in the absence of any evidence of an adverse holding they are assumed to hold under him, and their possession is his during the three years until the completion of the foreclosure.

An action on Pub. Sts. c. 175, for forcible entry and detainer, brought by the administrator of the estate of a mortgagee of the land before the expiration of three years from the foreclosure of the mortgage, is within the time prescribed by § 10.

A request for a ruling, which is not applicable to the facts appearing in the exceptions or to the state of the case as finally submitted to the court, is rightly refused.

ACTION on Pub. Sts. c. 175, brought on March 15, 1894, in the police court of Gloucester, by the administrator *de bonis non* of the estate of Oliver G. Lane, against Gideon L. Davis, Frederick M. Davis, and William F. Davis, to recover possession of certain premises in Gloucester. Trial in the Superior Court on appeal, without a jury, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

The defendants were the sons of William Davis, who died in 1889 or 1890.

The defendant, Frederick M. Davis, was *non compos mentis* at and before the date of the writ, and so continuing while the case was pending in the police court, counsel for the other defendants was appointed in that court guardian *ad litem* of Frederick M. Davis upon motion of the plaintiff. Nothing was done in relation to his disability in the Superior Court.

The plaintiff contended that the premises in question were conveyed in mortgage by William Davis to the plaintiff's intestate, in 1859, to secure the payment of a promissory note for $550, made by Davis; and a promissory note and mortgage, each dated December 20, 1859, were produced by the plaintiff as the note and mortgage referred to, they having been found by him among the effects of the deceased.

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Upon this note, which was payable in six years and witnessed, were several indorsements of payments of principal and interest, from February 9, 1861, to May 9, 1866, both inclusive, amounting to $289.75.

The plaintiff, for the purpose of proving his claim, offered in evidence the mortgage deed, which purported to be executed in the presence of two attesting witnesses, both of whom were defendants in this case, and one of them being the insane defendant mentioned above; but the plaintiff declined to call the other attesting witness for the purpose of proving the execution of the mortgage, although he was then present in court, contending that the mortgage, being more than thirty years old, proved itself. It did not appear that the mortgagee, or the plaintiff, or any one claiming under either, had ever been in possession of the premises in question.

The defendants objected to the introduction of the mortgage deed in evidence, on the ground that there was no legal proof of its execution, and that to entitle it to be admitted as evidence upon its mere production, and an offer of it in evidence, it must appear that it was followed by a possession under it; but the judge overruled the objection, and admitted the deed without further proof.

The plaintiff also introduced in evidence a certificate of foreclosure of the mortgage by open and peaceable entry, in August, 1888, in the presence of two witnesses, with a certificate of record in the registry of deeds thereon, within thirty days after the entry, such entry being twenty-nine years after the making of the mortgage and twenty-four years after the mortgage note fell due.

To rebut the presumption of payment arising from lapse of time, the plaintiff also offered in evidence the following indorsement on the mortgage note: "Received May 10th, 1866, a note for four hundred fifty-nine $\frac{79}{100}$ dollars being balance of the within note and interest to date, $459.79. O. G. Lane." This indorsement was not in the handwriting of William Davis, or of any of the defendants, and there was no evidence that the indorsement was ever known to any one of them. The plaintiff also offered in evidence another promissory note found among the effects of the intestate, of the same date and amount as the date and amount

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named in the indorsement on the first note, payable in six years, and signed by William Davis and attested. On this second promissory note were two indorsements of payments of $100 each, on November 21, 1866, and on November 3, 1874, the latter being in the handwriting of one Charlotte A. Lane, a witness and a party in interest, being the daughter of the plaintiff's intestate. She testified that she made the latter indorsement on the back of the second promissory note in the presence of William Davis, at the request of her mother, to whom it was claimed the $100 was paid, the money being on the table between them when the indorsement was made; but the witness did not state the amount of money then on the table; and there was no other evidence that William Davis knew the contents of the paper upon which the latter indorsement was made, or that he ever saw the indorsement after it was made. There was no further evidence to show any connection between the two promissory notes or the considerations therefor.

To the introduction of all this evidence the defendants objected, on the ground that there was no connection shown between the second note and the original note, and that the indorsement on the back of the original mortgage note, whether in the handwriting of the payee or of any other person made without the knowledge of William Davis or of the defendants, would not be competent to prove that the second note was given in payment of the first or mortgage note, and objected to the admission of the indorsement on the mortgage note and its recital as incompetent for any purpose whatever; but the judge overruled the objection, and admitted the evidence.

It did not appear that any notice of the entry to foreclose, except the constructive notice afforded by the record in the registry, was ever given to any of the defendants or their father, or that any of them knew of such entry before this action was brought.

It did not appear that any notice to quit the premises had ever been given to the defendants or any of them, or their father, before this action was brought; nor was there any evidence as to whether the defendants claimed as heirs of William Davis or, independently, under some other person, by purchase or otherwise, except that it appeared that two of them, including

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the insane defendant, were living upon the premises before and after their father's death, and when this action was commenced.

Before the evidence was all in it appeared that the defendant, William F. Davis, had not resided upon the premises for several years before the date of the trial, and thereupon the plaintiff moved to discontinue the action as against him. This motion was allowed against the objection of the defendants.

The defendants did not offer any evidence, but, when the plaintiff rested his case, requested the following rulings:

"1. Upon the whole case the plaintiff cannot recover. 2. There being no evidence that the defendants were in possession of the premises in question at the time of the suing out of the plaintiff's writ, the plaintiff cannot recover. 3. If any individual one of the three defendants was not in possession of the premises in question either on the day of the plaintiff's entry to foreclose or at any time subsequently, up to and including the day of the suing out of the plaintiff's writ, then the plaintiff cannot recover against any of the defendants. 4. This form of action will not lie against the heirs of the mortgagor by the administrator *de bonis non* of the mortgagee. 5. This action cannot be maintained because the defendants and their ancestors, if they were in possession as claimed, were in quiet possession for more than three years before the commencement of this action. 6. The plaintiffs cannot discontinue as to the defendant, William F. Davis, at this stage of the case."

The judge declined to give the rulings requested, and found and ordered judgment for the plaintiff; and the defendants alleged exceptions.

M. J. McNeirny, for the defendants.

J. W. Keith, for the plaintiff.

HAMMOND, J. The rule at the common law was that at least where there had been no adjudication of unsoundness of mind and no guardian or committee appointed and the mental trouble was not shown to be congenital, a *non compos* defendant of full age in an action at law must appear by attorney, and the failure to appoint a guardian *ad litem* was not error. *Beverley's case*, 4 Co. 123 *b*. Chit. Pl. (16th Am. ed.) 577. 2 Wms. Saund. 333. *King* v. *Robinson*, 33 Maine, 114.

In equity, however, the rule is different, and a guardian *ad*

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litem should in such case be appointed. *Wilson* v. *Grace*, 14 Ves. 172. Dan. Ch. Pl. & Pr. 176, and cases cited. *Mitchell* v. *Kingman*, 5 Pick. 431, 434. *Emery* v. *Parrott*, 107 Mass. 95.

Even if under the statutes and practice in this State a guardian in such a case as this should be appointed, (see *Mitchell* v. *Kingman*, *ubi supra*; Pub. Sts. c. 139, § 43; c. 165, § 25,) we see no error in this respect in the proceedings. While the case was pending in the police court, the attorney for the other defendants was appointed guardian *ad litem* to represent the interest of the *non compos* defendant. He was thus the guardian for the case, and, in the absence of anything appearing to the contrary, it may fairly be assumed that in the proceedings in the appellate court he was acting in the same capacity, so far as the interests of the *non compos* defendant were involved.

It was within the discretion of the court to allow the plaintiff to discontinue as to William F. Davis. It was in substance a nonsuit of the plaintiff as to him, and by leave of the court a plaintiff may become nonsuit even at the close of the evidence, except where a set-off has been filed. Pub. Sts. c. 168, § 21. Pub. Sts. c. 167, § 42. *Gray* v. *Cook*, 135 Mass. 189. *Taft* v. *Church*, 164 Mass. 504. *Truro* v. *Atkins*, 122 Mass. 418.

The action is brought by the administrator *de bonis non* of the estate of the mortgagee, and it is objected by the defendant that he is not the proper person to represent the estate in this respect.

By Pub. Sts. c. 133, § 6, it is provided that "When a mortgagee of real estate . . . dies without having foreclosed the right of redemption, the mortgaged premises and the debt secured thereby shall be considered as personal assets in the hands of his executor or administrator, and shall be administered and accounted for as such; and if the deceased has not in his lifetime obtained possession of the mortgaged premises, his executor or administrator may take possession thereof by open and peaceable entry or by action, in like manner as the deceased might have done if living." See *Taft* v. *Stevens*, 8 Gray, 504.

It does not appear by the bill of exceptions whether the entry in August, 1888, to foreclose, was made by the mortgagee or by the administrator; or whether the foreclosure had been com-

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pleted before the death of the mortgagee; and, inasmuch as this point is not pressed in the brief of the defendants and the evidence relating to it is not reported, we infer that the evidence at the trial showed that the foreclosure was not completed before his death. At any rate, in the absence of any report of the evidence on the subject, we cannot say that it was.

And we think that the administrator may avail himself of the provisions of Pub. Sts. c. 175, "in like manner as the deceased might have done if living," and that the process of forcible entry and detainer may be maintained when a mortgage has been foreclosed by entry without the exercise of a power of sale. Such is the plain reading of the statute, for the language is that the process will lie "when a mortgage of real estate has been foreclosed by a sale under a power contained therein or otherwise."

The most important questions are those which arise out of the evidence concerning the proof and validity of the mortgage title under which the plaintiff claims.

The mortgage was dated December 20, 1859. It purported to be executed in the presence of two witnesses, both of whom were alive at the time of the trial and were defendants in the case, one of them being the insane defendant and the other actually present in court; but the plaintiff declined to call either attesting witness, and insisted that the mortgage deed, being more than thirty years old, proved itself.

The defendants objected to the introduction of the deed on the ground that there was no legal proof of its execution, and that to entitle it to be admitted as evidence upon its mere production and an offer of it in evidence, it must appear that it was followed by a possession under it; but the court overruled the objection and admitted the deed without further proof.

It is a general rule that deeds appearing to be more than thirty years old, which come from the proper custody and are otherwise free from just grounds of suspicion, are admissible without any proof of execution. And while in some States the rule is not applicable if there is a living attesting witness within reach of the process of the court, (*Smith* v. *Rankin*, 20 Ill. 14, *Thompson* v. *Brannon*, 14 S. C. 542,) the general practice is the other way, and the rule is considered applicable even if the

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witness be living and actually in court. 1 Greenl. Ev. §§ 21, 570, and cases cited. *Green* v. *Chelsea*, 24 Pick. 71. *Jackson* v. *Christman*, 4 Wend. 277. *Gardner* v. *Granniss*, 57 Ga. 539. *Shaw* v. *Pershing*, 57 Mo. 416.

There has been much diversity of opinion whether the rule applies in cases of deeds of real estate where there is no proof of possession, but in England the doctrine seems to be that the absence of such proof goes rather to the weight of the evidence than to its admissibility; and in the United States the great weight of authority is that the deed is admissible without such proof. 1 Greenl. Ev. § 21. *Barr* v. *Gratz*, 4 Wheat. 213. *Harlan* v. *Howard*, 79 Ky. 373. *Hewlett* v. *Cock*, 7 Wend. 371. See also 2 Am. & Eng. Encyc. of Law, (2d ed.) notes to pp. 327, 328, for collection of the cases.

The deed in question was a mortgage. Such an instrument is not usually followed by the possession of the mortgagee, and its admission without evidence of possession was correct.

At the time of the entry to foreclose, the mortgage note had been more than twenty years overdue, and, to rebut the presumption of payment arising from lapse of time, the plaintiff offered in evidence the memorandum of May 10, 1866, on the back of the note, and a certain other note found among the papers of the intestate's estate of the same date and amount as named in that memorandum. This last note was payable to the order of the intestate in six years from its date, with interest annually, was signed by William Davis and duly attested. Upon this second note was an indorsement of a payment in 1874, in the handwriting of a daughter of the payee, who was a witness and a party in interest in this suit. She testified that she made this indorsement in the presence of the maker, at the request of her mother, to whom the money was claimed to be paid, the money being then on the table when the indorsement was made. She did not testify to the amount of money then upon the table, and there was no other evidence that the maker knew the contents of the paper upon which this indorsement was made, or that he ever saw it after it was made.

To the introduction of all this evidence the defendants objected, on the ground that there was no connection shown between the second note and the original note, and that the

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indorsement on the back of the original mortgage note, whether in the handwriting of the payee or of any other person, made without the knowledge of William Davis or of the defendants, would not be competent to prove that said second note was given in payment of the first or mortgage note, and objected to the admission of the indorsement on the mortgage note and its recital as incompetent for any purpose whatever; but the court overruled the objection and admitted the evidence.

The indorsement upon the first note and the second note both bear the same date, namely, May 10, 1866, and in the absence of evidence to the contrary each may be assumed to have been made on that date. At that time the mortgagee had two papers as security for his debt, — the mortgage and the note. Each was independent of the other, and he could have pursued his remedy upon either or both to secure his claim. He could have discharged the mortgage and relied solely upon the note, or he could have agreed to forego his right to charge the maker of the note personally and relied solely upon the mortgage; and even if by reason of the statute of limitations or of a discharge of the maker in insolvency, or by a renewal of the note, he had lost the right to recover upon it, the debt being still unpaid, he still could have held his mortgage as security and pursued his remedies thereon. The latter, unless discharged, remained in force until the debt is paid, or the right to enforce it is barred by the presumption of payment from the lapse of time. Jones on Mortgages, § 1204. *Thayer* v. *Mann*, 19 Pick. 535. *Norton* v. *Palmer*, 142 Mass. 433. Under these circumstances this memorandum was made upon the first note, and the second note was given by the mortgagor to the mortgagee for the amount set forth in the memorandum. No money seems to have been paid. A computation of the sum due upon the first note, giving due credit for all the indorsements thereon, shows that the sum therein named was a fair statement of the balance. The first note shows no further payments, while there are two indorsements upon the second note. The mortgage was not discharged, but both the second note and the mortgage were kept by the mortgagee. The memorandum may be assumed to have been made in the due course of business, and when there does not appear to have been any inducement to falsify. To a certain extent, also,

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it was an entry against the interest of the mortgagee, for while it did not purport to be a statement that the note was paid, still it did in substance cancel the note, and the mortgagee was thereby deprived of his right to collect his debt by proceeding thereon. At least, for the purpose of showing that he had lost this right, the memorandum was competent and was rightly admitted. Giving to it no other or further probative effect than this, and without reciting the evidence further in detail, we think the judge who tried the case was justified in finding that the second note was not regarded by the parties as a payment of the debt, but as a renewal of the old note for the balance unpaid, and that the payment of $100 was made by the mortgagor in 1874 upon the new note, and was part payment of the debt secured by the mortgage.

It follows that the mortgage was a valid outstanding mortgage at the time of the entry to foreclose. After the entry to foreclose the mortgagor and those claiming under him became tenants at sufferance of the mortgagee, and, in the absence of any evidence of an adverse holding, they are assumed to hold under him, and their possession is his, during the three years, until the completion of the foreclosure in August, 1891. *Ellis* v. *Drake*, 8 Allen, 161. *Porter* v. *Hubbard*, 134 Mass. 233.

The writ is dated in March, 1894, which is less than three years from the foreclosure, and since the defendant's estate was not ended until the completion of the foreclosure, the action was brought within the time prescribed by Pub. Sts. c. 175, § 10.

The second request was rightly refused because not applicable, since it appears by the bill of exceptions that two of these defendants were living upon the premises when the suit was commenced.

The third request was rightly refused because not applicable to the state of the case as finally submitted to the court.

Exceptions overruled.

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CHARLES F. HUNTING & others *vs.* GEORGE A. WARD.

Middlesex. January 12, 1900. — January 16, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Contract in Individual or Representative Capacity.

In an action for the services of a quartette in singing at a funeral, evidence of one of the plaintiffs, that the defendant called at his house and informed him of the death of a woman who was a member of the defendant's household, and wished the services of the quartette at her funeral at a time and place named, and that the defendant told the witness that the woman left money and the defendant would be the administrator of her estate, will warrant a finding that the defendant, who was appointed such administrator, reasonably was understood to contract in his private capacity.

CONTRACT, upon an account annexed, to recover twenty dollars for services in singing at a funeral. Trial in the Superior Court, before *Stevens*, J., who allowed a bill of exceptions, in substance as follows.

Gustave W. Ulmer, one of the plaintiffs, testified that the plaintiffs formed a male quartette called the Dalhousie Quartette; that on October 20, 1897, the defendant called at the witness' house and informed him of the death of one Trowbridge, and wished the services of the quartette at her funeral, which was to take place on October 21, at three o'clock P. M.; that the defendant asked the witness if he knew where he, the defendant, lived, and that witness said that he did; that the defendant told the witness that Mrs. Trowbridge had left money, and that the defendant would be the administrator of her estate; and that the plaintiffs were late at the funeral, owing to a mistake as to the house, not arriving until twelve minutes past three o'clock, but performed the services declared for.

The defendant testified that Mrs. Trowbridge had been for some years a member of his household; that on October 20 he saw the plaintiff Ulmer at his house and informed him of Mrs. Trowbridge's death, and that the services of the quartette were wished for at the funeral; that he asked Ulmer what price was charged by the quartette, and was told twenty dollars; that he

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told Ulmer that Mrs. Trowbridge had left some estate and he should probably be administrator, and also told Ulmer to send the bill to the estate of Mrs. Trowbridge (which last statement Ulmer denied), and further told Ulmer where the defendant lived; that the quartette were late in arriving at the house, not getting there until twenty-five minutes past three o'clock, and were all out of breath, as they had run to get to the house, and the first song was poorly sung; that on December 18, 1897, he sent to Ulmer a check for fifteen dollars for the services of the plaintiffs, signed by him personally, and indorsed on the margin of the face, "Adm'r of the estate of S. H. T.," inclosed in a letter stating that it "is all I think you are entitled to after we had to keep everything waiting so long for you"; that this check was returned to the defendant by Ulmer, who wrote demanding payment of twenty dollars; that the matter was placed in the hands of counsel, between whom and the defendant considerable correspondence passed; and that the defendant was duly appointed administrator of the estate of Mrs. Trowbridge.

The defendant asked the judge to rule that there was no contract between the plaintiffs and the defendant; but the judge declined so to rule.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

J. W. Keith, for the defendant.

W. S. Slocum & C. R. Darling, for the plaintiffs.

By the Court. The plaintiff's evidence warranted a finding that the defendant reasonably was understood to contract in his private capacity. Whether it warranted any other it is not necessary to consider. See *Durkin* v. *Langley*, 167 Mass. 577, 578.

Exceptions overruled.

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CHARLES M. THAYER, administrator, & another, *vs.* ELLEN F. PRESSEY, administratrix, & others.

Worcester. October 3, 1899. — January 25, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Trust — Patent — Assignment — United States Statute — "Legal Representatives" — Contract — Equity — Demurrer.

A., the owner of a patent, assigned it, together with all his right and title in and to any claims for past infringement thereof, to B., who prosecuted against certain agents of the United States a suit in his own name in the Circuit Court and obtained a decree on the merits ordering an accounting, no question having been raised as to the validity of his title under the assignment. Afterwards A. executed a contract with B. and C., an attorney, to share equally with them the sum realized from the prosecution of the claim after deducting all expenses incurred in such prosecution. A. died, and his daughter, who was appointed administratrix of his estate, contracted with B. and C. that if they would continue to prosecute the claim she would transfer the treasury warrant for the payment of the proceeds as soon as it should be issued, to joint trustees to collect the same and make distribution. Subsequently an act of Congress was enacted, authorizing the Secretary of the Treasury to pay to the "legal representatives" of A. a certain sum as "compensation in full for the use by the United States" of the patented invention, "as appears in the findings of law and of facts made by the United States Circuit Court" in the suit above named. B.'s administrator and C. brought a bill in equity against A.'s administratrix to enforce a trust in this money. *Held*, on demurrer, that the bill could be maintained.

In a bill in equity, by the assignee of a patent and of all right and title in and to any claims for past infringement thereof, to enforce a trust in a sum of money directed by a statute of the United States to be paid for such infringement, it is not necessary to annex a copy of the assignment nor to state the substance of its provisions in detail, but it is sufficient if the plaintiff states that he is the owner of an assignment in writing from the patentee of all his right, title, and interest in and to any and all claims for past infringement, and shows that the fund was appropriated by Congress as compensation for an infringement of the patent.

BILL IN EQUITY, filed in the Superior Court, by Charles M. Thayer, administrator of the estate of Sullivan Forehand, and Baxter E. Perry, against Ellen F. Pressey, as administratrix of the estate of John C. Howe and in her personal capacity, the Worcester National Bank, and George F. Blake, alleging the following facts.

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John C. Howe, late of Worcester, deceased, was the patentee named in certain letters patent of the United States, dated August 16, 1864, for improvements in cartridges.

On or about May 26, 1881, Sullivan Forehand and Henry C. Wadsworth, being then the owners by assignments in writing of all Howe's interest in the patent, and all his right, title, and interest in and to any and all claims for past infringement thereof, instituted in their own name proceedings in equity in the Circuit Court of the United States for the District of Connecticut, against certain officers and agents of the United States, who had purported to act in the premises as such, for infringement of the letters patent, and the suit was defended by the United States through their attorney for that district, and in the defence no objection was made to the complainants' claim as being held by them by assignment from Howe, but the case was tried on its merits, and the court held that the patent was valid and had been infringed, and ordered a decree in favor of the complainants for an accounting for the infringement charged.

After such decision, which was rendered on February 10, 1883, Forehand and Wadsworth presented to the Congress of the United States their memorial, setting forth the facts hereinbefore recited, and praying that just pecuniary compensation be made to them as assignees of Howe for all past infringement of the patent by the United States, or its officers or agents, and thereupon the claim of Forehand and Wadsworth was transmitted to the Court of Claims by the committee on claims of the Senate, on January 10, 1884, under the provisions of the U. S. St. of March 3, 1883. Under this reference the Court of Claims, upon a bill filed by Forehand and Wadsworth as such assignees, investigated all the facts material to the claim made by the memorial, including the validity of the patent, the infringement by the United States, and the proper pecuniary allowance for such infringement, covering the whole time from the grant of the patent, and reported to the committee on claims of the Senate on April 26, 1889, that a reasonable royalty for the United States to pay would be $66,907. In this litigation the defence was conducted by the United States through the Solicitor General, and lasted nearly five years; and in the successful prosecution of the claim before the courts and in Congress the plaintiff

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Perry lawfully expended more than $23,000, and Forehand lawfully expended more than $9,000, for which they have never been reimbursed.

On or about March 5, 1884, Wadsworth assigned to the defendant Blake all his right, title, and interest, legal and equitable, in and to the claim against the United States, as collateral security for the payment of Wadsworth's note, of even date therewith, for $5,000, which note has not been paid by Wadsworth.

On or about April 14, 1885, Forehand and Wadsworth gave to the plaintiff Perry a power of attorney, authorizing him to prosecute to final results in the Court of Claims and in Congress the claim against the United States before described. Wadsworth died while the claim was pending and before the passage of the act of Congress hereinafter referred to, and Forehand as surviving partner became the sole owner of the legal interest therein of Forehand and Wadsworth.

On or about November 8, 1889, Forehand and Perry entered into an agreement in writing with Howe, whereby each became entitled to one third of such sum as might thereafter be received from the United States pursuant to the prayer of the memorial, after deduction from such sum of the amount of certain expenses theretofore lawfully incurred by Forehand and Perry, in the litigation, and otherwise in establishing and furthering the claim, such expenses amounting to $25,500 and such further expenses, not exceeding $1,000, as might properly be incurred in the premises.

On August 18, 1892, Howe died intestate, leaving no widow, and leaving as his sole heir and next of kin a daughter, the defendant Pressey. On October 18, 1892, she was duly appointed the administratrix of the estate of Howe, and duly qualified as such.

In April, 1898, pursuant to the prayer of the memorial and to the decision and report of the Court of Claims, an act of Congress was passed, as follows:

"Be it enacted, . . . That the Secretary of the Treasury be and he is hereby authorized and directed to pay to the legal representatives of John C. Howe, deceased, sixty-six thousand nine hundred and seven dollars, out of any money in the Treasury not otherwise appropriated, the same being compensation

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in full for the use by the United States, to wit: in sixty-six million nine hundred and seven thousand three hundred and thirteen cup-anvil cartridges, of the invention secured to John C. Howe and his assigns by letters patent of the United States issued to him August sixteen, eighteen hundred and sixty-four, and number forty-three thousand eight hundred and fifty-one, during the entire term of said letters patent, as appears in the findings of law and of fact made by the United States circuit court for the district of Connecticut, in the case of Forehand and others versus Porter, reported in volume fifteen, of the Federal Reporter, at page two hundred and fifty-six, and as further appears in the findings of fact made by the Court of Claims, after full testimony and full hearing in Congressional case numbered one, entitled Forehand and others versus The United States, heard on reference of the matter to said Court of Claims by the Committee on Claims of the Senate under and pursuant to the Act of March three, eighteen hundred and eighty-three, commonly known as the Bowman Act, said findings of fact having been certified to the Committee on Claims of the Senate by said court on the twenty-sixth day of April, eighteen hundred and eighty-nine."

The act directed the payment to be made to the legal representatives of Howe, because he was the holder of the legal title to the fund and the plaintiff was but the holder of the beneficial or equitable estate therein.

The passage of the act was lawfully furthered and procured by Forehand and Perry through counsel employed by them for that purpose; and pending the proceedings thereon in Congress, and prior to the passage thereof, it was agreed by Pressey by a writing, dated June 15, 1894, which referred to the contract of November 8, 1889, that if Forehand and Perry would continue to prosecute the claim against the United States she would transfer the treasury warrant for the payment of the proceeds as soon as it should be issued, to joint trustees to collect the same and make distribution according to this agreement; and the payment was received by the defendant Pressey upon those terms; and it was then also agreed between them that the only sum to be deducted from the fund for expenses mentioned in the contract referred to should be the sum of $25,500.

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Shortly after the passage of the act of Congress, the amount specified therein was paid by the United States to the defendant Pressey, as such administratrix, as and for the compensation theretofore prayed for by Forehand and Wadsworth.

The defendant Pressey, upon receiving the amount of such payment, deposited the same in her name with the defendant bank, and the same still remains there to her credit, except that by order of court there has been paid out to her the sum of $650, and to counsel for professional services rendered by him in obtaining the passage of the act the sum of $10,102.

The fund is in the hands of the defendant Pressey charged with a trust in favor of the plaintiffs to the extent of $25,500 thereof and two thirds of the balance, namely, to the extent of $53,106, less the payments by order of court, leaving $42,352.

After the deposit with the defendant bank, Forehand died intestate, and the plaintiff Thayer was duly appointed and qualified as administrator of his estate.

The amount of $42,352 belongs to the plaintiffs in the following proportions: To the plaintiff Thayer, administrator, the amount of about $15,070, and to the plaintiff Perry about $27,252.66, the difference being due to the fact of the difference in the amounts of payments of the expenses by Forehand and Perry respectively, and the interest of Perry in the fund is further subject to a trust in favor of Blake to pay therefrom to him, for money lent to Wadsworth, the sum of $5,000 with interest at ten per cent from March 5, 1884.

The defendant Pressey contends that the whole amount of the fund is assets of the estate of Howe, and denies that either Thayer, administrator, or Perry or any person claiming under either of them has title to any part thereof.

Upon the receipt of the fund by the defendant, Perry and Forehand duly demanded of her payment of their share thereof, but she refused to pay the same or any part thereof, except the payments by order of court.

The prayer of the bill was that it might be decreed that the defendant Pressey holds in trust for the plaintiffs so much of the fund as amounts to $42,352.66, in the proportions hereinbefore set forth; that she be ordered to pay the same to the plaintiffs respectively, in such proportions, with interest thereon

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from the date of the receipt of the fund by her; and for an injunction.

The defendant Pressey demurred to the bill, upon the grounds, among others, that no copy of the assignment was set forth; that the proceedings in the Circuit Court and Court of Claims were, so far as the defendant was concerned, *res inter alios*, and neither she nor her intestate was a party to or bound or affected by such proceedings; and the same was true as to the memorial to Congress and the action taken thereon; that as to the claim to reimbursement for expenditures made in the litigation, neither the defendant nor her intestate was a party to such litigation or expenditures or bound or affected thereby; that the act of Congress directs that the fund be paid to the legal representatives of Howe, and they were exclusively entitled to the fund; that the assignment, the contract of November 8, 1889, and the agreement made by the defendant on June 15, 1894, were all void by the provisions of the statutes of the United States; and that the defendant had no authority as administratrix to make such an agreement.

Hearing upon the bill and demurrer, before *Fessenden*, J., who, at the request of the parties, reserved the case for the consideration of this court. If the demurrer was sustained without amendment allowed, the bill was to be dismissed; otherwise, such order was to be made as justice and equity might require.

H. Parker, (*C. C. Milton & C. Bullock* with him,) for the defendant Pressey.

C. Browne & C. M. Thayer, (*G. S. Taft* with them,) for the plaintiffs.

KNOWLTON, J. This case is reserved for our consideration on the bill and a demurrer which goes to the merits of the whole case. Ellen F. Pressey, hereinafter called the defendant, as she alone defends on the issues now raised, is the daughter and sole heir of John C. Howe, late of Worcester, deceased, and is the duly appointed administratrix of his estate. As his legal representative she was paid about $67,000 by the treasurer of the United States under an act of Congress passed in April, 1898, which is as follows: "Be it enacted, . . . That the Secretary of the Treasury be and he is hereby authorized and directed to pay to the legal representatives of John C. Howe, deceased, sixty-six

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thousand nine hundred and seven dollars out of any money in the Treasury not otherwise appropriated, the same being compensation in full for the use by the United States, to wit: in sixty-six million nine hundred and seven thousand three hundred and thirteen cup-anvil cartridges, of the invention secured to John C. Howe and his assigns by letters patent of the United States issued to him August sixteen, eighteen hundred and sixty-four, and numbered forty-three thousand eight hundred and fifty-one, during the entire term of said letters patent, as appears in the findings of law and of fact made by the United States circuit court for the district of Connecticut in the case of Forehand and others versus Porter, reported in volume fifteen of the Federal Reporter at page two hundred and fifty-six, and as further appears in the findings of fact made by the Court of Claims, after full testimony and full hearing in Congressional case numbered one, entitled Forehand and others versus The United States, heard on reference of the matter to said Court of Claims by the Committee on Claims of the Senate, under and pursuant to the Act of March three, eighteen hundred and eighty-three, commonly known as the Bowman Act, said findings of fact having been certified to the Committee on Claims of the Senate by said court on the twenty-sixth day of April, eighteen hundred and eighty-nine." This money, less $10,752 paid by order of the court on account of expenses, is on deposit to her credit in the defendant bank, and the plaintiffs contend that, by virtue of an assignment and certain contracts, it is charged with a trust in their favor for the sum of $25,500 expended in preliminary litigation and in prosecuting the claim before Congress, and also for two thirds of the balance as the share to which they are entitled under the assignment and contracts, less the amount of said payments made by order of the court, making the amount of their present claim $42,352. The last of these contracts was executed on June 15, 1894, by the defendant herself. Her father died on August 13, 1892, and she was appointed administratrix on October 18, 1892. The assignment and contracts set out in the bill, with the accompanying averments, present a case of strong equities in favor of the plaintiffs, unless the existence of the statutes and decisions on which the defendant relies so affects their conduct as to pre-

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vent their recovery. The defendant contends that the assignment and contracts under which the plaintiffs claim are void under the Revised Statutes of the United States, § 3477, which is as follows: "All transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same." This statute is a re-enactment from the U. S. St. of February 26, 1853, which is entitled "An Act to prevent frauds upon the treasury of the United States," and which has frequently been considered by the Supreme Court of the United States. 10 U. S. Sts. at Large, c. 81. In *Spofford* v. *Kirk*, 97 U. S. 484, it was held that a duly accepted order given by the holder of a claim against the United States in favor of a third person, upon one whom he had employed to collect the claim, and afterwards transferred to a purchaser for value, who took it in good faith, could not be enforced against the drawer upon the fund. Mr. Justice Strong, in giving the opinion, said: "It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." Notwithstanding this strong general lan-

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guage, the court has since recognized exceptions to its universal inclusiveness. In *Goodman* v. *Niblack*, 102 U. S. 556, 559, 560, it is said that the mischiefs intended to be remedied by the statutes are, "First, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction. Second, that by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest." The court then says that "both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the government, and not the parties to the assignment." It was decided in this case that a voluntary assignment of a claim against the United States with other property by an insolvent debtor, with preferences, was valid, notwithstanding the statute. It had previously been held in *Erwin* v. *United States*, 97 U. S. 392, that the statute did not apply to assignments by operation of law, and that such claims passed by an assignment in bankruptcy. See *Price* v. *Forrest*, 173 U. S. 410.

The doctrine that "the object of the statute was to protect the government and not the claimant, and to prevent frauds upon the treasury" has been strongly stated in numerous other cases. See *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494; *Bailey* v. *United States*, 109 U. S. 432; *Hobbs* v. *McLean*, 117 U. S. 567. Accordingly, while the government may always disregard an assignment of a claim against it, there is a class of cases in which claims against the United States have been included in assignments and transfers and have passed from the assignor to the assignee with full effect between the parties, as incident to the general subject of the contract. *Hobbs* v. *McLean*, 117 U. S. 567, was a case where one having a contract with the United States to furnish army supplies, made an agreement with others whereby they were to become partners with him and have a share in the money to be received from the United States. It was held that such a transfer of an interest in the claim was valid

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as between the parties and was not within the statute. In *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494, the United States government was a lessee of real estate and liable to pay rent, and on an assignment of the lease and the rent under it, it was held that there was nothing in this statute which invalidated the transaction as between the parties, the government having chosen to recognize the assignment. In *Barrow* v. *Milliken*, 74 Fed. Rep. 612, it was decided by the Circuit Court of Appeals, while considering this statute, that a sugar planter might mortgage and pledge his crop and his claim for a bounty to be received from the United States, in such a way as to be effectual against himself and others claiming under him, although the claim had not been presented and allowed. The plaintiff in *Jernegan* v. *Osborn*, 155 Mass. 207, was the owner of one sixteenth part of the ship Europa, whose owners sustained losses by reason of services rendered by the ship in assisting in the rescue of nine hundred seamen in the Arctic seas. Afterwards he sold his interest in the ship to the managing owner, and still later he sold to the same person all his interest in the voyage in which the losses occurred, including "any claims by the owners of said Europa against the United States government." Afterwards, by an act of Congress, an award was made to the owners of the vessel in full compensation for these losses, and it was held that the plaintiff's share in the award passed to the defendant under the assignment, and that the statute did not render the assignment void as between the parties. In all these cases there was something more than a naked assignment of a claim for the purpose of collection and enjoyment, and in each of them the claim, as a part of the transaction, or as an incident, was of substantial importance. In only one case, so far as we know, where the assignment of the claim was an incident to a larger transaction, has it been said that the assignment was invalid as between the parties. In that case (*St. Paul & Duluth Railroad* v. *United States*, 112 U. S. 733) another ground for the decision is stated which is conclusive, namely, that there is no description in the conveyance sufficient to include the claim, and it is then said that if there were, the assignment of it would be invalid under the Revised Statutes of the United States, § 3477. The question whether it should make a difference that the

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assignment was a mere incident to the conveyance of the principal subject to which the conveyance related, apparently was not considered. In one of the latest cases in which the statute has been considered, the present Chief Justice of the United States speaks of "the intent of Congress that an assignment of naked claims against the government for the purpose of suit, or in view of litigation or otherwise, should not be countenanced." In the next sentence he treats the statute as analogous to the rule against maintenance and champerty. *Hager* v. *Swayne*, 149 U. S. 242, 247. In *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314, 336, Mr. Justice Grier says of the statute, "This act annuls all champertous contracts with agents of private claims."

Another exception to the broadest application of this statute has been established. It has repeatedly been held that if the government has recognized the validity of an assignment which otherwise would be void under the act, the assignor is bound by the recognition which in terms he authorized. *Bailey* v. *United States*, 109 U. S. 432. *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494. *Goodman* v. *Niblack*, 102 U. S. 556. The late case of *Ball* v. *Halsell*, 161 U. S. 72, does not change the doctrine of any of the cases above cited. The decision rests upon a different statute from that in question, namely, the U. S. St. of March 3, 1891, which applied directly to the claim then before the court, and was held to be constitutional. The reference to the former statute was principally to show how the legislation had grown up, and what were the inducements to the enactment of the later act.

In the present case Forehand, the plaintiff Thayer's intestate, and his partner Wadsworth, who has since deceased, took from Howe, the defendant's intestate, an assignment of his patent, together with all his rights and claims for past infringements of it. The claim against the United States for an infringement was one in which they would have an interest as purchasers of the patent. The establishment of the claim that the manufacture of cartridges by the United States was an infringement, might have an important effect upon the value of the patent in reference to existing conditions, as well as to a possible renewal of it. They prosecuted a suit in their own names in the Circuit Court of the United States, and obtained a

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decree upon the merits ordering an accounting, no question having been raised by the representatives of the United States as to the validity of their title under the assignment. So far as appears upon the bill, their title to the claim against the United States seems to be similar to those in the cases above cited, where there was not an assignment of a naked claim for the purpose of collection, but a conveyance of substantive property with which the claim was connected and to which it was in a sense incident. So, too, their claim was similar to others above referred to, in having been recognized by the government. Throughout the litigation in the Circuit Court of the United States the government, by its representatives, assumed that their title was good, and contested the claim only on the question whether the manufacture was an infringement of the patent. Moreover, the act of Congress first above quoted and the averments of the bill show that the money was given upon proceedings pending before Congress in the names of the assignees, and purporting to be for their benefit, and that the appropriation was in compensation for the use shown in the case in the Circuit Court of the United States prosecuted by the assignees. The findings of law and of facts in two cases prosecuted in the names of the assignees are adopted into the statute and made the foundation of the appropriation. The term "legal representatives," used in the act, ordinarily means executors or administrators; but it is a broad expression which may refer to heirs, or to others who represent rights by succession under a conveyance. See *Lodge* v. *Weld*, 139 Mass. 499, 504. The power of sale in a common form of mortgage in this Commonwealth is to "the mortgagee and his legal representatives," which certainly gives the authority to assignees of the mortgage as well as to executors or administrators. It is to be noticed in the present case that when the statute was passed, the defendant had for a long time been the sole administratrix of John C. Howe's estate, and this must be presumed to have been known when the bill was enacted. In view of the nature of the assignment from Howe, as stated in the bill, and in view of the recognition of the assignees by the representatives of the government, we are of opinion that the statute is not to be interpreted as giving the money to the defendant to be wholly

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distributed as a part of her father's estate, but to be disposed of according to the interests then existing under the assignment of the patent and the claims for an infringement of it, and under the contract which Howe had subsequently made in reference thereto. There is the more reason for so holding, inasmuch as the defendant, after her father's death, recognized the assignment and this contract in the most formal way, before the act of Congress was passed, and solemnly contracted that if the plaintiffs would continue to prosecute the claim she would transfer the treasury warrant for the payment of the proceeds as soon as it should be issued, to joint trustees, to collect the same and make distribution. Neither this contract which she made, nor the last contract of her father which she adopted, purported to be an assignment. He had previously made as effectual an assignment as he was capable of making.

It is contended in her behalf that she had no authority as administratrix to make such a contract. There is strong ground for an argument that the relation of her father's estate to the claim under the assignment and the proceedings in court and before Congress and under the contract of November 8, 1889, recognizing the title of the assignees, was such as to make it proper for her to contract as she did. Whether as administratrix she could bind the estate in this way or not, so far as she undertook to bind herself and her interest as sole heir at law, it would be most inequitable to permit her to repudiate her agreement.

All that we have said is applicable to the claim of Thayer, administrator of Forehand, who with Wadsworth was one of the two original assignees. The bill avers that since the death of Wadsworth Forehand has been the owner of his legal interest as surviving partner, and that Thayer as administrator represents the entire claim, except as it is affected by the assignment from Wadsworth to Blake as collateral security for the payment of a note for $5,000, and by the agreement with the plaintiff Perry, and the subsequent agreements with Howe and with the defendant. That the equitable claims under the original assignment to Forehand and Wadsworth should be held to be good under the act of Congress we feel very certain. In regard to the claim of Perry we have more doubt. Perhaps we may presume that Congress, when it

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directed payment to the legal representatives of Howe and referred to the claims of the assignees, was aware of the facts in regard to the title, and that the act was passed in reference to Howe's contract of November 8, 1889, and the subsequent contract of the defendant. Congress was legislating in regard to a title held by legal representatives, and it is fair to assume that it thoroughly understood the subject of the legislation. In that view, whether the original contract with Perry was valid or not, inasmuch as these later contracts had reference to a claim already assigned by Howe to Forehand and Wadsworth under an assignment which appears to have been proper, and to have been recognized by the government, perhaps we properly may infer an intent on the part of Congress that the money should be held and distributed by the defendant under these contracts. Seemingly, by agreement of the plaintiffs, Perry is joined as a plaintiff with the administrator of Forehand, whose title we have no hesitation in upholding, and there is no demurrer to his claim, except that which is included in the demurrer to the whole title of the plaintiffs. Apparently it will make no difference to the defendant whether the suit proceeds in the names of both plaintiffs or in the name of Thayer, administrator, alone. This part of the case has not been argued by the defendant, and we do not know that she cares to object to Perry's claim, if the only effect of the objection would be to leave his share in the hands of Thayer. These last contracts seem to have been advantageous to Howe's estate, and as their validity is assumed by all the other parties, and as there is no demurrer applying particularly to Perry's title, we are not inclined to sustain the defendant's demurrer on account of Perry's claim under them, or on account of the assignment to Blake.

The defendant demurs to the bill because no copy of the original assignments is annexed and no sufficient statement of their contents is set out. We are of opinion that the plaintiffs were not bound to annex a copy of the assignments nor to state the substance of their provisions in detail. They were bound to state all the substantive facts on which their right to relief depends, among which is their title to a share in the fund. This they sufficiently set forth when they state that they are the owners by assignments in writing from the patentee of all

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his right, title, and interest in and to any and all claims for past infringement, and show that the fund was appropriated by Congress as compensation for an infringement of the patent. See Story, Eq. Pl. §§ 257 *et seq.*; 6 Encyc. of Pl. & Pr. 287, and notes. *Demurrer overruled.*

JOHN T. HEARD & another, trustees, & another, *vs.* CHARLES H. TRULL & others.

Middlesex. March 24, 1899. — January 26, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Will — Termination of Trust — Statute — Power of Trustees — Practice.

Where an estate is devised to trustees to pay the income to A. for life, and on his death it is directed that the trust estate shall be divided into two equal parts, one of which shall go to B. and his heirs in fee, and the other part shall be divided among the testator's heirs at law, the estate, at the death of A., vests in B. and the heirs of the testator, in equal moieties, as tenants in common, and the provisions of the St. of 1898, c. 65, do not apply.

Where there is a right of appeal from the Probate Court to this court, the matter in controversy should be judicially heard and determined in the court below.

Where the trustees under a will have power to convert personal estate into money, a petition for the protection of the trustees may be maintained under St. 1898, c. 65, which provides for the distribution of trust estates.

PETITION to the Probate Court under St. 1898, c. 65, entitled "An Act relative to the distribution of trust estates." Hearing before *Hammond*, J., who entered a decree, and an appeal was had to the full court. The facts appear in the opinion.

G. A. Sanderson, for the appellants.

F. N. Wier, for the appellees.

LATHROP, J. The will of John W. Trull has been before this court in three cases. *Sohier* v. *Eldredge*, 103 Mass. 345. *Heard* v. *Read*, 169 Mass. 216. *Heard* v. *Read*, 171 Mass. 374.* The first case has no bearing upon the questions before us. The second case decided, among other points, that the testator had in mind his heirs at law living at the time of the decease of his

* The material portions of the will may be found in *Heard* v. *Read*, 171 Mass. 374, 375.

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daughter, when the one half was to be divided among his heirs at law; and that the words "as though I died intestate" meant "as though I then died intestate." In the third case it was decided that the trustees, after the death of Mrs. Eldredge, had no power under the will to sell the real estate, and divide the proceeds, one half to John T. Heard and one half among those who would have been the heirs of the testator, had he died intestate at the time Mrs. Eldredge died. The court left undetermined the question whether the trustees had any power to divide the real estate. The court also left undetermined two other questions: first, whether, if the will did not give the trustees the power to sell, the court could give them that power on the facts appearing in the case; and, secondly, whether the persons interested had a remedy in the Probate Court under the St. of 1898, c. 65.

The present application is a petition to the Probate Court under the statute last mentioned, by the trustees under the will of John W. Trull and by one of the nieces of the testator. The prayer is that the court, "after such notice as it may direct, may order the said estate, both real and personal, so given to said heirs, to be converted into cash and distribution thereof to be made to such individuals as according to such will seem to be entitled thereto; and for that purpose that your petitioners, the said trustees, may make sale and conveyance and transfer at private sale or at public auction at their election of both said real and personal estate."

On the day appointed for a hearing in the Probate Court the respondents appeared, but the petitioners did not appear, and the court dismissed the petition on this ground, as appears by the decree. The trustees only appealed from the decree to this court. The case was heard by a single justice of this court, who entered a decree directing the trustees to sell the estate both real and personal of John W. Trull, and pay the net proceeds to the heirs of John W. Trull, according to the statutes relating to the descent of real estate in the case of persons dying intestate on July 4, 1895, the date of the death of Mrs. Eldredge; and the case was ordered to be remitted to the Probate Court to ascertain the persons so entitled to receive the proceeds, and for an order of distribution, and for such further proceedings as might

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be necessary in the premises. From this decree the five persons who would constitute the heirs at law of John W. Trull, determined as of the date of Mrs. Eldredge's death, according to the statutes relating to the descent of real estate in force at the date of the death of John W. Trull, namely, April 12, 1867, appealed to the full court.

In the first place we deem it proper to say that the petitioners should have appeared and presented their case to the Probate Court, and that this court should not be converted "from an appellate tribunal, as contemplated by the statutes, into a court of original jurisdiction." *Parker* v. *Parker*, 118 Mass. 110.

Passing from this, the principal question in the case is whether the St. of 1898, c. 65, has any application to the case before us. Section 1 of this chapter is as follows: "Whenever by the provisions of a written instrument a trust estate is to be distributed in whole or in part among the heirs or next of kin of any person or persons, or to a class of persons, the probate court, on the application of any person interested, after such notice as it may direct, may order the said estate, both real and personal, or either, to be converted into cash, and distribution thereof to be made to such individual or individuals as, according to such instrument, seem to be entitled thereto, and such order of distribution shall protect the trustee obeying the same as fully as an order of distribution in the case of an intestate estate."

So far as the personal estate is concerned, while it is true, as was said in *Heard* v. *Read*, 169 Mass. 216, 225, that the trustees have power to convert it into money, we are of opinion that the petition may be maintained under the St. of 1898, c. 65, for the protection of the trustees.

So far as the real estate is concerned, the question is, as stated in *Heard* v. *Read*, 171 Mass. 374, "Whether the trustees still hold the legal estate in the real property, or it is vested in John T. Heard and the heirs of the testator." This question was not decided in that case; though it was discussed, and speaking of the language of the will the court said: "This language does not indicate that the testator intended that the real estate after Mrs. Eldredge's death should be converted into money by the trustees, and the money paid to the persons entitled to it. It rather indicates that the trust premises, so far as they consisted

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of real estate, should specifically go in fee simple either to the issue of Mrs. Eldredge or to John T. Heard and the testator's heirs at law, to be divided as directed by the will." Now the will directs that, in the contingency which has occurred, namely, the death of the daughter without issue surviving her, "the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. Heard and his heirs in fee forever, and the other part shall be divided among my heirs at law, as though I died intestate."

It does not seem to us that the testator intended that the trustees should have any power after the death of Mrs. Eldredge to make a partition of the estate, as no such power is specifically given to them, nor is it fairly to be implied. The intent of the testator was as to the real estate that John T. Heard should have one half, and his heirs the other half. This would make them tenants in common; and their shares vested at the death of Mrs. Eldredge. See *Simonds* v. *Simonds*, 112 Mass. 157, 165; *Belote* v. *White*, 2 Head, 703; *Farrow* v. *Farrow*, 12 S. C. 168, 172. In each of these cases a provision that an estate in the hands of trustees should be divided on a certain event happening, was held not to continue the trust for the purposes of division.

It follows that the decree of the single justice must be modified so far as it relates to the real estate of the testator; and that in other respects it is affirmed. *Decree accordingly.*

WILLIAM H. CARSON *vs.* SEWERAGE COMMISSIONERS OF BROCKTON.

Suffolk. November 23, 1899. — January 30, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Sewer — Statute — Ordinance — Constitutional Law.

The St. 1892, c. 245, providing that the city council of any city except Boston, or a town, with sewers laid out under Pub. Sts. c. 50, §§ 1–8, or with a system of sewerage under § 7, may establish just and equitable annual charges or rents for the use of such sewers, to be paid by every one who enters his sewer into the

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common sewer, and an ordinance of a city thereunder, charging for "unmetered" water service eight dollars, and for "metered" water service thirty cents per thousand gallons of sewage delivered to the sewer, but no charge to be less than eight dollars subject to certain possible discounts, are constitutional.

PETITION for a writ of certiorari to quash an assessment upon the petitioner's property in Brockton for the use of a common sewer. The respondents demurred to the petition. Hearing upon the petition and demurrer, before *Barker*, J., who, at the request of the parties, reserved the case for the consideration of the full court; such order to be made as law and justice might require. The facts appear in the opinion.

F. M. Bixby, for the respondents.

W. H. Carson, pro se.

HOLMES, C. J. This is a petition for a writ of certiorari for the purpose of quashing the assessment of an annual charge for the use of a common sewer. The assessment was authorized by St. 1892, c. 245, § 1, and by an ordinance in pursuance of that section. It is objected that both statute and ordinance are unconstitutional.

By the statute the city council of any city except Boston, or a town, with sewers laid out under Pub. Sts. c. 50, §§ 1–3, or with a system of sewerage under § 7, may establish just and equitable annual charges or rents for the use of such sewers, to be paid by every one who enters his sewer into the common sewer. The ordinance charges for "unmetered" water service eight dollars, and for "metered" water service thirty cents per thousand gallons of sewage delivered to the sewer, but no charge to be less than eight dollars subject to certain possible discounts. It is argued that the statute is subject to the objections which prevailed in *Sears* v. *Street Commissioners*, 173 Mass. 350, that the charge is a tax which properly should be borne by the public generally, and that there are no provisions for a hearing.

We are of opinion that the petitioner received a special benefit for which he might be charged, and that this case is free from the elements which in *Sears* v. *Street Commissioners* led to the conclusion that the petitioner was assessed without regard to the benefits received by him. No one denies that it was a special benefit to the petitioner to have a sewer built in front of his land. That benefit was the probability that the sewer

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would be available for use in the future. But the city, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it.

The charge allowed by the act is a charge for using the sewer, a benefit distinct from that originally conferred by building it. By the statute the charge must be a "just and equitable" charge. These words have been held insufficient to save the constitutionality of a statute in *State* v. *Commissioners of Streets & Sewers*, 9 Vroom, 190, and in *Barnes* v. *Dyer*, 56 Vt. 469. But the facts of those cases were too different to make them conclusive. Here the words are applied solely to those who actually use the sewer. Therefore the benefit to the parties assessed is established. The assessment in order to be equitable must be proportional to the benefit and not in excess of it. The words in this connection sufficiently express an intent to confine the charge within constitutional limits. They are so construed by the ordinance. For by the ordinance the charge is in proportion to the extent of the use, which is a reasonable way of estimating the extent of the benefit received. See *Parker* v. *Boston*, 1 Allen, 361, 367. There is no charge unless the sewer is used. The charge to the plaintiff was $42.53, and therefore under the terms of the ordinance which we have stated must have been determined by meter.

It is said that there is no provision for a hearing. But under the ordinance the only questions are whether the petitioner's sewer enters the common sewer, and what amount of sewage is shown by the meter readings to have been delivered to the sewer. If the petitioner wished to be heard on either of these facts, no doubt he could resort to the courts. On the rate per thousand gallons fixed by the ordinance he was not entitled to be heard. So far as appears, if he is dissatisfied with the rate he is not obliged to use the sewer. But if he were compelled by law to use it and to pay as now for the use, (St. 1890, c. 132,) and recognizing as we must the possibility that, in spite of the

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meaning which we attribute to the statute, the rate fixed by the ordinance might be in excess of the benefit received, still in our opinion the act and ordinance would be valid, notwithstanding that mere possibility in the absence of any allegation that the rate fixed did exceed, in fact, the benefit received. In cases of this sort the petitioner has no right of appeal to a jury. *Howe* v. *Cambridge*, 114 Mass. 388. The final decision must be somewhere, and may as well be left to the city council as to any one. *New London Northern Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386, 387, 388. If it is left to them they are not obliged to hear the several parties who may be affected before fixing a general rate. Clearly the rate might have been fixed by the Legislature without a hearing. *Parsons* v. *District of Columbia*, 170 U. S. 45. And whatever differences there may be between the Legislature of the State and inferior although legislative bodies in cases where particular property is to be valued, still when a uniform and self-adjusting rate is adopted under which no question as to proportion can arise, or any other question except the general one whether the rate is high, we are of opinion that the Legislature has power to authorize a city council to determine that question as it has done here. *United States* v. *New Orleans*, 98 U. S. 381. *Railroad Commission cases*, 116 U. S. 307. *Spencer* v. *Merchant*, 125 U. S. 345, 356. *Chicago, Milwaukee, & St. Paul Railway* v. *Minnesota*, 134 U. S. 418, 459. *Reagan* v. *Farmers' Loan & Trust Co.* 154 U. S. 362, 394. See further *Leominster* v. *Conant*, 139 Mass. 384.

If under the pretence of fixing an equitable rate the ordinance should do what amounted to the taking or destruction of property, very possibly that might afford a ground for judicial interference as in other cases where the Legislature fixes rates. *Smyth* v. *Ames*, 169 U. S. 466. *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649. *Chicago, Milwaukee, & St. Paul Railway* v. *Minnesota*, 134 U. S. 418. See *Parker* v. *Boston*, 1 Allen, 361.

Petition denied.

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NATICK GAS LIGHT COMPANY *vs.* INHABITANTS OF NATICK. SAME *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Middlesex. November 18, 1898. — February 27, 1900.

Present: KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Abolition of Grade Crossings — Alteration of Grade — Discontinuance of Way — Taking of Land — Statute — Damages.

A gas company cannot maintain a petition under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, relating to the abolition of grade crossings, against a town to recover the expense incurred by the petitioner in taking up and relaying its main pipe in a street, the grade of which has been altered by proceedings under those statutes.

Under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, relating to the abolition of grade crossings, and providing for the recovery of damages sustained by an abutter on a way by the discontinuance of such way "to the same extent as damages are now recoverable by law by abutters on ways discontinued by towns," a gas company, which owns land abutting on a street discontinued by proceedings under those statutes, cannot recover against the town, if it is not shown that the loss of the right to keep its main pipe in the street diminished the value of its land; but it may recover against the railroad corporation the value of so much of the pipe as lay in its land which was taken by the proceedings in question.

TWO PETITIONS, under St. 1890, c. 428, as amended by St. 1891, c. 123, to recover damages alleged to have been sustained by the petitioner in its property by the alteration of the grade of a public way, the discontinuance of a way, and the taking of land, in connection with the abolition of certain grade crossings in the respondent town. The cases were tried together in the Superior Court, before *Fessenden*, J., who directed the jury to return a verdict for the respondent in each case; and, at the request of the parties, reported the cases for the determination of this court. If such direction was right, judgment was to be entered for the respondent in each case; otherwise the verdict in each case was to be set aside and a new trial had. The facts appear in the opinion.

The case was argued at the bar in November, 1898, and afterwards was submitted on briefs to all the justices except *Holmes*, C. J.

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R. P. Clapp, for the petitioner.

P. H. Cooney, for the respondents.

HAMMOND, J. By reason of the abolition by proceedings under St. 1890, c. 428, of certain grade crossings of the streets and railroad in Natick, the petitioner was deprived of certain land, and was put to expense in altering some of its mains legally existing in the public streets. The land taken consisted of a parcel not included in any street, and an adjoining parcel included in the location of Harris Street. This latter street, upon which the land of the petitioner abutted and into which from its gas works its chief distributing main ran, was discontinued, and the land formerly included within its location was taken for the new location of the railroad, which was built at a grade much below the former grade of the street. This compelled the petitioner, at an expense of $430, to substitute for the Harris Street main a new one in another locality. Of this loss $40 was in respect of so much of the main as lay in the petitioner's own land in Harris Street. By the raising of the grade of Main Street, two blocks distant from this locality, the petitioner was obliged, at an expense of $1,085.51, to take up and relay its main in that street.

The questions raised by the report are whether the company can recover by petitions under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, its loss of $1,085.51 on account of the Main Street main, and its loss of $430 on account of its Harris Street main, and if it cannot recover the whole of the latter loss, whether it can recover the $40, which represents its loss in respect of so much of its Harris Street main as lay in its own land in Harris Street.

1. As to the expense with respect to the Main Street pipe. The provision for the assessment of damages in the case of a change of grade of the highway under this statute is found in § 5, which, so far as material to this question, is as follows: "All damages sustained by any person in his property by the taking of land for, or by the alterations of the grade of, a public way," in case the parties cannot agree, may be determined by a jury "in the same manner and under like rules of law as damages may be determined when occasioned by the taking of land for the locating and laying out of . . . public ways." Whether

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the phrase "in the same manner," etc., is to be considered as referring to the mode of ascertaining the damage already given in the preceding part of the statute, or as descriptive of the kind of injury for which damages may be assessed, (see *Rand* v. *Boston*, 164 Mass. 354; *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180,) it is certain that, so far as material to the question now before us, the language of the whole section is no broader than the provisions of Pub. Sts. c. 49, §§ 14, 16; for by the former of these two sections damage "sustained by any persons in their property" by change of grade of the street is given, and by the latter section it is provided that in estimating such damage "regard shall be had to all the damages done to the party whether by taking his property or injuring it in any manner."

It becomes necessary to inquire into the nature of the loss sustained by the company. The pipe was personal property and the title to it did not change. *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75. By reason of the change of grade it was no longer useful as originally placed, but it was still the property of the petitioner. The petitioner, as against the land owner, had in itself no easement. Its only right was as stated by Bigelow, C. J., in *Commonwealth* v. *Lowell Gas Light Co.*, *ubi supra*, "to use land, the whole beneficial use of which had been previously taken from the owner and appropriated for a public use, in such manner that no nuisance shall be committed, no disturbance be created to the easement of the public, and no injury done to" other parties. It is permitted to share in the general use for which the public have paid. But whether this right, although not rising to the dignity of an easement, be a valuable one, the loss of which is a damage to the petitioner within the doctrine laid down in *Marsden* v. *Cambridge*, 114 Mass. 490, it must, nevertheless, be regarded as subordinate to the general purpose for which the land was originally taken, to wit, public travel, and must yield to the necessities of that purpose.

The permission to lay down pipes in the public ways, whether or not so long as the way remains public and the pipe does not interfere with the other general public uses it be revocable, must be held to have been granted originally upon the condition that the pipes, neither at the time of the laying nor thereafter, shall interfere with the public travel upon the way as then existing or

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as it may thereafter be changed to meet the reasonable exigencies of such travel. To hold otherwise, and to say that whenever under the statute permission a gas pipe is laid in a public way the pipe cannot be disturbed, even to make such changes as are required by public travel, except under the right of eminent domain, is to make what is a merely subordinate use paramount to the great important use for which the land is taken. Such a construction seems to us unreasonable.

Under the true construction it is plain that no legal right to property of the petitioner was invaded; and even if it be claimed that the language of the statute is broad enough to give damages in some cases for injuries suffered not as the consequence of the loss, or invasion of a legal right, still we cannot apply any such rule here. In removing its pipes the petitioner was simply complying with an implied condition annexed to the permission under which its pipes were laid. It had agreed in law that its pipes should lie in the way at its peril, so far as respects the exigencies of public travel. It was, therefore, not entitled to recover for the expense as to the pipe in Main Street.

2. As to the loss of $430 in respect of the Harris Street main. There is an additional reason why this loss cannot be recovered. It was due neither to a taking of land for, nor to the alteration of the grade of, a public way, and the town could be held only on the ground that the damage was occasioned by the discontinuance of the street. While the statute as first enacted contemplated that by proceedings under it public ways would be discontinued, it did not expressly mention the subject of damages by such a discontinuance. See St. 1890, c. 428, §§ 4, 5. In the year 1891, an amendment was enacted "so as to provide for the assessment of damages in case of the discontinuance of a public way." This amendment does not say that all damages sustained by any person in his property by the discontinuance of a public way in effecting the abolition of a grade crossing shall be paid for. The amendment was by inserting certain words in St. 1890, c. 428, § 5, and we quote the beginning of the section as amended. "Section 5. All damages sustained by any person in his property by the taking of land for, or by the alterations of the grade of, a public way, or by an abutter thereon, for the discontinuance of such public way, to the same extent as damages

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are now recoverable by law by abutters on ways discontinued by towns, shall primarily be paid by the city or town." The new obligation is only to abutters on the discontinued way, and for such damages only as are recoverable by law by abutters on ways discontinued by towns. The gas light company was, in the language of the statute, an abutter on the discontinued Harris Street, and the further question is whether its loss with respect to the Harris Street main was a damage recoverable by law by an abutter on a way discontinued by a town.

What damages are "recoverable by law by abutters on ways discontinued by towns" is an inquiry to which our statutes and decisions give no easy or categorical answer. The statutes now in force and most closely relating to the subject are Pub. Sts. c. 49, §§ 66, 68, which give towns the right to discontinue town ways and private ways, and say that "if damage is sustained by a person in his property by the . . . discontinuance of a town way or private way, . . . he shall receive such compensation as the selectmen or road commissioners shall determine." There is contained also in Pub. Sts. c. 49, § 16, a rule for estimating the damage sustained by discontinuing a highway, which is regarded as applicable to damages occasioned by the discontinuance of town ways also, and is that regard shall be had to all the damages done to the party and that the benefit, if any, to his property shall be allowed by way of set-off. The earlier statutes seem to be of no special importance to the present inquiry. See Sts. 1785, c. 75, § 7; 1812, c. 121; 1826, c. 171, § 5; 1827, c. 77, §§ 11, 12; Rev. Sts. c. 24, §§ 70, 76, and also §§ 11, 13, 31; Gen. Sts. c. 43, §§ 60, 62, and also §§ 14, 16. St. 1824, c. 153, § 3. Cases in which the subject has been before this court are *Hallock* v. *Franklin County*, 2 Met. 558; *Fenner* v. *Sheldon*, 11 Met. 521, 524; *Smith* v. *Boston*, 7 Cush. 254; *Perry* v. *Sherborn*, 11 Cush. 388; *Castle* v. *Berkshire County*, 11 Gray, 26; *Hawkins* v. *County Commissioners*, 2 Allen, 254; *Webster* v. *Lowell*, 139 Mass. 172; *Webster* v. *Lowell*, 142 Mass. 324; *Spaulding* v. *Nourse*, 143 Mass. 490; *Davis* v. *County Commissioners*, 153 Mass. 218; *Hammond* v. *County Commissioners*, 154 Mass. 509; *Stanwood* v. *Malden*, 157 Mass. 17; *Nichols* v. *Richmond*, 162 Mass. 170. See also *Pearson* v. *Allen*, 151 Mass. 79, 83; *Shaw* v. *Boston & Albany Railroad*, 159 Mass. 597. In these decisions

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it has been settled that the damage must be the direct and immediate consequence of the discontinuance, and that indefinite, remote, and contingent damages are not recoverable. Inconveniences which the petitioner experiences in common with all the rest of the community, and which consequently are not special or peculiar in kind, he cannot have compensation for, although, in consequence of the proximity of his lots or buildings to the place discontinued, he may feel the inconveniences more than others. Therefore, although the petitioner's land may abut upon the part of the street which is discontinued, if his property is still accessible by public ways, and his only complaint is that access to it is not so easy as before, he cannot recover. But in the leading case of *Smith* v. *Boston*, the court declined to lay down a rule that in no case can a man have damage for the discontinuance of a way unless his land bounds upon it; and in *Webster* v. *Lowell*, a verdict giving damages for narrowing the debouchement of a private way by the discontinuance of a part of the street into which it opened was sustained, although the private way was one gained by prescriptive use in connection with land which in its whole frontage abutted on that part of the same public street which was not discontinued, and so continued to be accessible by a public street. In none of the cases has any claim for damages been considered or passed upon, except claims for cutting off or making more inconvenient the access of travel to some parcel of land.

Besides being open for travel, public streets may be put to many other valuable uses by the owners of abutting estates, and by others, and if the right to make these uses of the street is taken away by the discontinuance of the street, the abutter or the person enjoying the valuable use will be damaged. An abutter may maintain in the street his own particular drain connecting his land with the common or public sewer. He may so maintain his own service pipe connecting the plumbing of his buildings with the street water main of the city or town or of a water company authorized to supply water. He may have his own private wires or pipes in the street connecting his premises with the pipes or wires of gas companies, or of electric light companies or of telephone companies, or of steam heating companies or pneumatic service companies, authorized to have their pipes, wires, or conduits in the street.

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So, too, street railway companies, gas, water, electric light, telegraph, telephone, pneumatic service, steam heating and power, and other like companies may obtain legal permission to have their structures and appliances in the public streets. By the discontinuance of the street, if the abutter or the corporation so using the street had no other right to maintain these structures or appliances than that which depended upon the fact that the place where they were was a public street, but had a right to have them there so long as the street existed, the right would be lost by the discontinuance of the street, and the loser would be damaged. This damage would be neither indefinite, remote, nor contingent, nor experienced in common with all the rest of the community, but would be special and peculiar in each instance. Could it be recovered in all or any of the cases instanced, or would it be held as it was suggested in *Stanwood* v. *Malden*, *ubi supra*, that "it would have been intelligible for the Legislature to say that, when a benefit is conferred upon a landowner, the value of which he does not pay for, he takes it upon the implied condition that he shall not be paid for it when it is taken away?"

Whatever answer may be given to any of these questions, we think that no one now has a right to recover for the discontinuance of a way by a town, unless he can show that some parcel of his land is diminished in value by the discontinuance. It is not enough to show such a diminution in value, if it is caused merely by lessening the convenience of approach, if the land is still freely accessible by public ways. If the diminution in value is caused by the loss of the right to maintain in the street particular drains, pipes, conduits, wires, or the like appliances, even if the damage should be considered a peculiar and special one and recoverable, if the loss of the right did not diminish the value of some parcel of the petitioner's land, he could not recover, although the loss of the right entailed pecuniary loss of some other nature. As the damages "recoverable by law by abutters on highways discontinued by towns" are in our opinion restricted to damages caused by the diminution of the value of land, we think no other damages for the discontinuance of a public way by proceedings for the abolition of a grade crossing are made payable by St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1. In the present case, it is not shown by the agreed

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statement of facts on which the trial was had that the loss of the right to keep its main on Harris Street diminished the value of the gas company's land, and therefore that damage cannot be recovered of the town in the petition against it.

We think that so much of the loss in respect of the Harris Street main as is due to that part of it which was in the portion of the gas company's land included in the street, and, upon the discontinuance of the street taken for the new location of the railroad, was recoverable in the petition against the railroad company, as an element in the value of the land taken and the diminution of the value of the petitioner's remaining land. The gas company did not lose its right to keep that part of the main where it was by the discontinuance of the street, because the gas company had the fee, but did lose the right by the taking for the railroad. Upon that taking the right of the gas company was extinguished, and the damages to be paid for the taking should be assessed in view of the presence of the main in the petitioner's land taken.

According to the terms of the report judgment is to be entered for the town in the first case, and in the second case the verdict is to be set aside and a new trial had. *So ordered.*

MICHAEL J. O'BRIEN & others *vs.* CORNELIUS MURPHY & others.

Essex. November 8, 1899. — February 27, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Continuing Bond.

A bond, after reciting that the obligor had been chosen by the association as treasurer, and as such would receive the property of the association and was bound to keep accurate accounts of money in his hands and to be received by him as treasurer, declared that if he "shall well and truly perform and singular the duties of treasurer of said association for and during the term for which he has been elected and during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office, or to such other person or persons as said association or

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its authorized officers may direct according to the provisions of the constitution, by-law, rules and regulations of said association now existing or which may be by said association adopted, then this obligation shall be void; otherwise to be and remain in full force." The election was for one year, and by the by-laws the office of treasurer was an annual one. At the time the bond was given, the obligor was holding office under his first election. *Held*, in an action on the bond, that the phrase "during such further time as he may continue to hold said office" must be held to apply to such further time beyond the term of one year as the principal might hold the office by virtue of his first election, and that it was not intended to cover the time under which he might hold office under any subsequent election.

CONTRACT, against the obligor and sureties of a bond given by the obligor as treasurer of the Ancient Order of Hibernians, Division No. 3, a voluntary benevolent association. The facts appear in the opinion.

H. I. Bartlett, for the plaintiffs.

A. W. Reddy, (*G. W. Cate* with him,) for the defendants.

HAMMOND, J. In the Superior Court the ruling was that the bond was not a continuing bond, and the demurrer was sustained on that ground; and the only question argued before us is whether this ruling was correct. In view of the conclusion to which we have come, we have not found it necessary to consider the other grounds of the demurrer.

The general rule is that where there is a recital in the bond specifying the time during which the prescribed duty is to be performed by the principal, and the words of the condition are general and indefinite as to the time for which the surety is to be liable, such general words will be construed as limited by the recital, and the surety will be held liable only for the time therein specified. It is fair to presume that the parties had in contemplation only a liability for the time specified in the recital. Brandt, Suretyship, § 166. *Arlington* v. *Merricke*, 2 Saund. 403. *Liverpool Waterworks* v. *Atkinson*, 6 East, 507. In the latter case the bond, after reciting that the defendant had agreed with the plaintiff to collect its revenues "from time to time for twelve months," contained the condition for the faithful performance of the principal "from time to time and at all times thereafter during the continuance of such his employment," and that "so long as he should continue and be employed by the company from time to time observe and perform the orders of their committee as far as the same should concern his said em-

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ployment." The general language was held to apply only to the twelve months.

The same rule is applied where the office or employment is by law or usage limited to a certain time, even if that fact be not recited in the bond. *Bigelow* v. *Bridge*, 8 Mass. 275. *Dedham Bank* v. *Chickering*, 3 Pick. 335. *Amherst Bank* v. *Root*, 2 Met. 522. *Chelmsford Co.* v. *Demarest*, 7 Gray, 1. In this last case the sureties on the bond of the treasurer of a manufacturing corporation who under the statute was to be "chosen annually" and hold his office "until another is chosen and qualified in his stead," were bound only for the year for which he was chosen and for such further time as was reasonably sufficient for the election and qualification of his successor and no longer, although the corporation failed to elect at their next annual meeting, notwithstanding that the condition of the bond stipulated for faithful performance of the principal "during his continuance in said office." Shaw, C. J., in giving the opinion, says: "Perhaps a bond might be framed, reciting that whereas the principal has been elected to the annual office of treasurer, and conditioned for his faithful performance of his duties for that term, and for such further time as he might continue to hold the same by annual re-election — such contract being clear and explicit as to the intent, and made by parties competent to bind themselves — and they remain bound, not because the office was not annual, but because they had anticipated future elections, and provisionally bound themselves accordingly. But the authorities are uniform, that, when the office is annual, the parties to the bond are presumed, by law, to bind themselves accordingly, if there are no words inserted in the bond, clearly extending it to a future election. *Hassell* v. *Long*, 2 M. & S. 363."

And even when there is language in the condition carrying the liability beyond the time for which the principal is elected, it is construed with considerable strictness, and the sureties are held only for such time as is plainly and explicitly therein specified. The leading principle is that the principal is not to be held beyond the precise terms of his contract. Thus, in *Middlesex Manuf. Co.* v. *Lawrence*, 1 Allen, 339, the sureties on a bond of the treasurer of a company conditioned for the faithful

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discharge of his duties "during the term for which he has been elected, and for and during such further time as he may continue therein by any re-election or otherwise" were held not liable for defaults occurring in years when, after being out of the office for a short time, he was again elected. See also *Lexington & West Cambridge Railroad* v. *Elwell*, 8 Allen, 371; *Richardson School Fund* v. *Dean*, 130 Mass. 242.

In the present case the bond, after reciting that the defendant Murphy has been chosen by the association as treasurer, and "by reason whereof and as such treasurer he will receive into his hands and possession divers sums of money, goods, and chattels and other things, the property of said association, and is bound to keep true and accurate accounts of all moneys and sums of money now in his hands and all which he shall receive by virtue of his office as treasurer aforesaid," proceeds as follows: "Now, therefore, if the said Cornelius Murphy shall well and truly perform and singular the duties of treasurer of said association for and during the term for which he has been elected and during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office, or to such other person or persons as said association or its authorized officers may direct according to the provisions of the constitution, by-law, rules and regulations of said association now existing or which may be by said association adopted, then this obligation shall be void; otherwise to be and remain in full force."

It appears by the declaration that the election was for one year, and it was conceded at the argument before us that by the by-laws of this association the office of treasurer was an annual office. Murphy therefore held his office by annual election. At the time the bond was given, he was holding office under his first election. If it was the intention of the parties that the sureties were to be held during the whole time that he should continue to hold his office by annual elections or otherwise, there was no difficulty in plainly expressing that intent. We do not think that intent is plainly expressed in the phrase "during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office." Although the election was

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for only one year, yet it might reasonably be anticipated that there sometimes would be considerable delay in the election and qualification of a successor, either by reason of the failure of the organization to effect an election, or the failure of the person elected to qualify, or from some other cause.

Applying the well settled rules of interpretation applicable to such contracts, we think that the phrase "during such further time as he may continue to hold said office" must be held to apply to such further time beyond the term of one year as the principal might hold the office by virtue of his first election, and that it was not intended to cover the time under which he might hold office under any subsequent election.

Exceptions overruled.

NATIONAL BANK OF COMMERCE *vs.* CITY OF NEW BEDFORD.

Bristol. December 12, 1899. — February 27, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Tax — Abatement — Appeal — Objection to Jurisdiction — Commissioner — Law and Fact — National Bank — Value of Shares — Evidence — Estoppel.

It is no bar to the jurisdiction of the court that an appeal to the Superior Court, under St. 1890, c. 127, for an abatement of taxes, was entered less than thirty days after the assessors had given the appellant notice of their decision under § 2, providing that the entry shall be made "at the return day first occurring not less than thirty days after" such notice of the decision; nor that the appeal was not tried at the first trial term, as provided in § 4, if the objections are not seasonably taken.

A commissioner appointed under St. 1890, c. 127, § 5, upon an appeal to the Superior Court for an abatement of taxes assessed on shares of a national bank, is authorized to find the fair cash value of such shares, and his judgment in matters of fact is not open to revision by this court on exceptions.

An expert may testify to value, although his knowledge of details is chiefly derived from inadmissible sources, but the fact that he may use hearsay as a ground of opinion does not make the hearsay admissible.

The excess of the assets over the liabilities of a national bank at a stated time is of no importance in determining the fair cash value of its shares for the purposes of taxation, where there is sufficient evidence of a sum for which the shares could have been sold on that date.

A national bank, at the trial of a petition for the abatement of a tax assessed upon its shares, supported the report of a commissioner that the fair cash value of its

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shares for the purposes of taxation was their market value as found by him. Subsequently the bank voted to petition for an abatement of the tax for 1897 upon the basis of the difference between the assessed valuation and the fair cash value of its shares based on the cash sales on or about May 1 of that year. The assessors had requested the bank to submit a statement of the price at which its shares were actually sold at the last sale prior to May 1, mentioning that the last quoted sale before that day was at a certain rate, to which the bank made no reply. *Held*, that the bank was not estopped to set up that the fair cash value of its shares for the purposes of assessment was less than the cash sales on or about May 1, 1897.

APPEAL to the Superior Court, under St. 1890, c. 127, from the decision of the assessors of the respondent city, on a petition for an abatement of taxes assessed upon the shares of the petitioner. Trial, without a jury, before *Braley*, J., who found for the petitioner; and the respondent alleged exceptions. The facts appear in the opinion.

L. LeB. Holmes, for the respondent.

O. Prescott, Jr., for the petitioner.

HOLMES, C. J. This is an appeal to the Superior Court, under St. 1890, c. 127, for an abatement of taxes, and is here on exceptions. It was entered, we assume, in less than thirty days after the assessors had given the appellant notice of their decision under § 2, and the suggestion is made at the outset that this is fatal to the jurisdiction by the terms of that section. But, so far as we can see, if this point is open to the respondent, the provision for entry at the return day first occurring not less than thirty days after notice is only for the convenience of the city or town concerned as party to the litigation, and does not go to the jurisdiction of the court in such a sense that the court is not at liberty to proceed with the case if an early entry is allowed to be made without objection. No objection was taken in this case. The averment in the tardily filed answer that "the taking, entering, and prosecuting of this appeal was not authorized" goes to a different point, namely, the meaning of the directors' vote authorizing the petition, as to which some argument is made. We are aware of the strict rule that has been applied in some cases to an attempt to enter late when the party's rights are barred, but it does not seem to us that the same strictness should be extended to entries made too soon, when the right to enter is outstanding and a proper entry could be made if the party had notice that the letter of the law was insisted upon. *Palmer*

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v. *Dayton*, 4 Cush. 270. *Eddy's case*, 6 Cush. 28. *Custy* v. *Lowell*, 117 Mass. 78.

The Superior Court was asked to rule that it had no jurisdiction because the appeal was not tried at the first trial term as provided in § 4. The reason for the delay seems to have been that the respondent had not filed an answer, but it now contends that no answer was necessary and that the right of the Superior Court to try the appeal expired with its first sitting. What happened was that after the answer was filed the court appointed a commissioner under § 5, by agreement. We do not care to say more of the respondent's position than that the provision for early trial is for the respondent's benefit, could be waived by it, and, even more plainly than that concerning entry, does not go to the jurisdiction of the court.

Another suggestion was made that the directors' vote authorizing the petition authorized it only to the extent that the assessed valuation exceeded the fair cash value "based on the cash sales on or about" May 1, 1897. Probably the cash sales referred to were cash sales which the petitioner offered to prove but was prevented from proving by the objection of the respondent. If so, we cannot tell what the supposed limit would be; but, further, we think that the vote meant to authorize application for whatever abatement the bank could get, and as the city withdrew this objection before the commissioner we are surprised that it should have been renewed here.

We pass to the questions upon the merits. The tax rate was $16.20 per thousand dollars. The assessors found the fair cash value of the shares of the bank to be $73.65 a share (in excess of realty), and assessed a tax of $11,931.50. The Superior Court granted an abatement of $2,211.37 and interest. The case had been referred to a commissioner, as we have stated, under St. 1890, c. 127, § 5, and was heard on his reports. The abatement seems to have been reached by adopting the commissioner's finding that the fair cash value of the shares was $60 a share, subject to a possible question of law which we shall mention but which is not open now. It is objected in the first place, we presume under the request for a general ruling that the petitioner was not entitled to an abatement, that the commissioner was not authorized to find the value of the shares, as that was the issue to

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be determined, but only facts relevant to the determination of that issue by the court. We cannot agree to the objection. The fair cash value was itself a question of fact, and the fact that it was an issue did not withdraw it from the cognizance of the commissioner any more than a similar fact necessarily would withdraw a particular conclusion from the sphere of testimony. *Poole* v. *Dean*, 152 Mass. 589, 591.

On the first of May, 1897, the bank was in the midst of a local panic or depression due to recent revelations concerning some of the New Bedford mills. The last auction sale of the stock was in November, 1896, at $80 a share. This was before the depression. The next one proved was in November, 1897, at $59.50. Experts set the value on May 1 at from $45 to $55. The respondent says that their testimony should not have been admitted, or at least should not have been followed, but that the respondent should have been allowed to prove private sales, stock quotations from the files of a newspaper, and "the intrinsic value of the assets of the bank," after paying all its liabilities, and that the commissioner erred in excluding this evidence and in disregarding, as he said that he did, the returns made by the bank to the comptroller of the currency according to which the stock should have been worth $123 or $124 a share. A ruling was asked to the effect that the cash sales about May 1 were for $80, and therefore that the petitioner was not entitled to an abatement.

A portion of the argument for the respondent is addressed rather to matters of fact than to questions of law, and therefore is not pertinent to the case in its present stage. For instance, when the commissioner reports that he "disregards" the evidence of the returns he does not mean that he rules it to be inadmissible, for he ruled the other way, but he means that as a judge of facts he finds it untrustworthy and uninstructive for good reasons, which he gives. We have nothing to do with his judgment on this point. So the degree of importance to be attached to the testimony of the experts is not to be discussed here, and, generally, which elements of the admissible evidence should have the prevailing weight in fixing the value to be determined is for the judge of facts. Upon the same principle the ruling requested, even if the premise that the sales about May 1

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were for $80 had been undisputed, was for a conclusion which was not matter of law. It was a question of fact not only whether the sales were proved, but also whether they afforded a fair criterion of value.

The respondent argues as if it had saved an exception to the exclusion of evidence of private sales of stock from April 24, 1897, to November 3, 1897. But it appears from the record that this evidence was offered by the petitioner and objected to by the respondent. It is enough to add that we think the commissioner probably was right in considering the evidence uninstructive under the conditions not denied to have existed on the first of May. *Eaton* v. *Mellus*, 7 Gray, 566, 579, 580. He was right also in rejecting newspapers purporting to contain stock quotations furnished by named New Bedford stockbrokers who could have been called. *Whelan* v. *Lynch*, 60 N. Y. 469, 474. *Schmidt* v. *Herfurth*, 5 Rob. (N. Y.) 124, 145. See *Silverstein* v. *O'Brien*, 165 Mass. 512; *Ashworth* v. *Kittridge*, 12 Cush. 193; *Payson* v. *Everett*, 12 Minn. 216, 219.// An expert may testify to value although his knowledge of details is chiefly derived from inadmissible sources, because he gives the sanction of his general experience. But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible.// See *Whitney* v. *Thacher*, 117 Mass. 523, 527; *Finnegan* v. *Fall River Gas Works Co.* 159 Mass. 311; *Smith* v. *North Carolina Railroad*, 68 N. C. 107, 116; *Central Railroad & Banking Co.* v. *Skellie*, 86 Ga. 686, 693, 694; *Hoxsie* v. *Empire Lumber Co.* 41 Minn. 548, 551; *Laurent* v. *Vaughn*, 30 Vt. 90, 94, 95; *Thatcher* v. *Kaucher*, 2 Col. 698. In *Fennerstein's Champagne*, 3 Wall. 145, and possibly in *Cliquot's Champagne*, 3 Wall. 114, the Supreme Court of the United States showed its willingness to go a little further than this court has gone, although not so far as to let in these newspapers. A later case is more cautious in its expressions. *Chaffee* v. *United States*, 18 Wall. 516, 542. In *Sisson* v. *Cleveland & Toledo Railroad*, 14 Mich. 489, 497, and *Peter* v. *Thickstun*, 51 Mich. 589, 593, the precise facts do not appear. If it was held that newspaper reports are admissible under some circumstances, when better evidence is not attainable, we do not need to differ from the decision in this case, as here the sources of the reports were at hand. See Whart. Ev. (3d ed.) § 674.

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The exception mainly relied upon seems to be that which was taken to the exclusion of evidence that "the intrinsic value of the assets and property of the petitioner bank on May 1, 1897, was, after paying all its liabilities, in excess of an amount equivalent to eighty dollars per share of its capital stock." In view of the former decision between these same parties, 155 Mass. 313, the respondent is driven to the argument that, although such evidence would not be controlling, it is admissible. But under the circumstances of this case the argument is merely technical, — an argument for a right which could have no influence on the case. There was an ascertainable sum for which these shares could have been sold on May 1, and that being so, it was useless to prove that the public ought to have been willing to give more.

It is true that it has been held, not without hesitation, that at common law you could look behind market values to get at corrected values as shown by subsequent events, in an action for fraudulent representations where the fraud which deceived the plaintiff also may have deceived the public. *Whiting* v. *Price*, 172 Mass. 240, 242. But, generally speaking, when a statute requires the "fair cash value" of property on a certain day to be ascertained, Pub. Sts. c. 13, § 8, it refers to the actual judgment of the public as expressed in the price which some one will pay, not to what the court at a later time may think would have been a wiser opinion. It means the highest price that a normal purchaser, not under peculiar compulsion, will pay at that time to get that thing. *Bradley* v. *Hooker*, 175 Mass. 145. If the word "fair" is thought to add a little latitude to the definition and to allow a correction of whatever was the fleeting accident of a moment of panic by the consideration of values on either side of the precise time fixed by the statute, that correction has been made, by setting the value of the stock at sixty rather than at fifty dollars. The commissioner added ten dollars a share for that very purpose. But it appears to us that the excess of assets over liabilities is of no importance for that purpose, as it throws no light whatever upon the selling prices of the stock. There was sufficient evidence upon which to form an opinion of the selling price, defined as we have defined it, without the need of resorting to such indirect methods of getting

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at it, and therefore the attempt to divert the inquiry into a wrong channel was met properly enough by a rejection of the evidence.

A ruling was asked and an argument is made that the bank is estopped to set up that the fair cash value of its shares for the purpose of assessment was less than the cash sales on or about May 1, 1897, and that those sales were at $80 a share. We have said or implied already that it does not appear that the sales nearest to May 1 and before that date were fair tests of value at the time, and of course it does not appear that they were fair tests of value on May 1, after the storm had struck the market. We have mentioned that the sales referred to in the vote to apply for an abatement possibly if not probably referred to sales not put in evidence. But if there had been a sale at public auction on the first of May and the vote had referred to it in terms, we still should be quite at a loss to see any element of estoppel in the conduct of the bank, whether in the vote, or in trying the case reported in 155 Mass. 313, or in not informing the assessors of sales later than April 24, or for less than $80,* and, as we do not find a shadow of a ground for one in the argument for the city, we shall not spend time in establishing a negative. *Troy Cotton & Woolen Manuf. Co.* v. *Fall River*, 167 Mass. 517, 520.

The difficulty of dealing with this case has been enhanced by the failure of the argument to follow the exceptions or to refer to them in such a way as to make clear upon what particular ruling or refusal to rule it was proceeding. But we have examined it and compared it with the bill of exceptions, and we are satisfied that no error is made out. *Exceptions overruled.*

* The vote authorized the cashier to execute on behalf of the bank a petition for the abatement of the tax for 1897, "based upon the difference between the assessed valuation per share and the fair cash value thereof based on the cash sales on about the first day of May, 1897." Soon after the first of May the assessors wrote to the cashier of the bank, requesting him to submit to them a statement of the price at which shares of the bank were actually sold at the last sale prior to May 1, 1897, and mentioning that, according to a list published in a local paper on April 28, the last sale of the bank stock was at the rate of $80 per share; to which the bank made no reply.

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COMMONWEALTH *vs.* TIMOTHY L. MORRISSEY.

Berkshire. January 8, 1900. — February 27, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Indictment for Adultery — Evidence.

It is an answer, in a criminal case, to the question whether it is competent to convict upon an uncorroborated confession, that question being an abstract one, not raised upon the evidence and on which the court was not required to express an opinion, that the undisputed facts were sufficient corroboration.

INDICTMENT, for adultery. At the trial in the Superior Court, before *Stevens*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

P. J. Moore, for the defendant.

C. L. Gardner, District Attorney, for the Commonwealth.

HAMMOND, J. The defendant was indicted for adultery with Bridget Lee. At the trial it appeared that at the trial of a complaint for bastardy made by the said Bridget Lee, who was a single woman and had been delivered of an illegitimate child, against one Curry charged with being the father of the child, in which the issue was whether Curry was the father of the child, this present defendant, being duly sworn as a witness, testified that on three several occasions, one being the day named in the indictment, at Hinsdale in the County of Berkshire, he had carnal knowledge of the body of the said Lee, and that he was on all such occasions a married man.

It is to be assumed that this evidence was there introduced to show that by reason of such sexual intercourse there might be a doubt as to whether the defendant in that suit was the father of the child, since that was the ground upon which such evidence was admissible; and this testimony could throw doubt upon that issue only upon the theory that the conception of the child might have occurred as the result of such intercourse.

Since the woman was delivered of a child, the natural inference is that she had had sexual intercourse with a man; and as

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she had never been married, there was evidence that a crime had been committed, fornication or adultery, according as the man was single or married at the time. The evidence lacking was simply as to the identity of the man, and that evidence was furnished by the confession of the defendant. Under these circumstances, the question whether it was competent to convict upon an uncorroborated confession was an abstract one, not raised upon the evidence, and on which the court was not required to express an opinion. The undisputed facts were sufficient corroboration, if any was needed. *Commonwealth* v. *Tarr*, 4 Allen, 315. *Commonwealth* v. *McCann*, 97 Mass. 580.

Exceptions overruled.

JOHN GREEN & others *vs.* FRANCIS A. GASKILL, executor, & another.

Worcester. October 20, 1899. — February 28, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Equity Jurisdiction of the Probate Courts — Right of Trustees to have Accounts adjusted in Probate Court.

The equity jurisdiction given by statute to the Probate Courts over all cases relating to trusts created by will and the termination thereof is a concurrent jurisdiction shared by the Superior Court and by this court; and while the fact that in the records of the Probate Courts are found the wills under which such trusts arise and the inventories and accounts of the trustees, with their official bonds, the proceedings under which they were appointed and other matters affecting the trust, may have been a reason for conferring this concurrent jurisdiction, it does not enlarge that jurisdiction or enable those courts to entertain any bill which could not also be entertained by the Superior Court or by this court; nor does it enable a Probate Court upon its equity side to do any of those things upon a bill in equity with reference to such a trust which can be done by a Probate Court under its probate jurisdiction only.

Trustees appointed by a Probate Court, as well as guardians, administrators, and executors so appointed, have a right to have their accounts adjusted and the amounts due to or from them as trustees determined in the Probate Court, on its probate side and in the usual probate proceedings, and they cannot be compelled first to render their accounts or made to pay over the fund, by proceedings in equity or at law, save after and in pursuance of such an adjustment and determination on the probate side of the court.

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BARKER, J. One John Green, who died in the year 1865, left by his will one fifth of the residue of his estate in trust. The first trustee was Meltiah B. Green, who during his life was entitled to apply the income of the fund for the benefit of himself and his family, keeping the principal unimpaired. From the time of his death without issue on May 24, 1888, his widow, Mary S. Green, was entitled to the whole income of the fund during her life. After the death of Meltiah B. Green the defendant Gaskill was appointed trustee of the fund, a position which he still holds. Mary S. Green, the widow, was appointed as executrix of the will of Meltiah B. Green on October 2, 1888. She died on January 7, 1896, and upon her death the plaintiffs became under the will of John Green entitled as remainder-men to one half of the principal of the trust fund.

Mary S. Green, as executrix of Meltiah B., on September 28, 1895, filed in the Probate Court an account of Meltiah B. as trustee of this trust fund, and that account has never been allowed. On June 29, 1896, Gaskill, as trustee of the fund, filed an account of his trust in the Probate Court. On January 29, 1896, Gaskill was also appointed executor of the will of Mary S. Green. On March 3, 1896, the defendant Parker was appointed administrator *de bonis non* with the will annexed of Meltiah B. Green.

In January, 1898, the plaintiffs filed upon the equity side of the Probate Court the present bill in equity against Gaskill as executor of the will of Mary S. Green, and as trustee under the will of John Green, and against Parker as administrator *de bonis non* with the will annexed of Meltiah B. Green. The bill alleges, in addition to the facts already stated, that the trust fund first placed in the hands of Meltiah B. Green as trustee was of about $30,000 in amount; and that during his life he appropriated to his own use a large part of the principal of the fund, amounting to about $10,000, impressed with the trust, and which at his death formed part of his estate. That by his will he gave all of his estate to his widow, who knew that he had appropriated the $10,000 of the trust fund to his own use, and that in her hands it was still impressed with the trust. That upon her death this property still impressed with the trust has come into the hands of Gaskill as executor of her will. That

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the plaintiffs are entitled, the trust being now ended by the death of Mary S. Green, to one half of all the principal of the trust fund, including the part of the fund appropriated by Meltiah B. Green in his lifetime to his own use, and now in the hands of Gaskill as executor.

The prayer is that an account may be taken of all the funds which came to the hands of Meltiah B. Green as trustee of the fund, and of the proceeds thereof, if the same have ever changed in form; also an account of all funds belonging to the trust fund which came to the hands of Mary S. Green as executor of her husband's will, with knowledge by her of their misappropriation by her husband to his own use, and of all which came to the hands of Gaskill as executor of her will; and also an account of all funds, if any, belonging to the trust estate which have come to the hands of the defendant Parker as administrator *de bonis non* with the will annexed of Meltiah B. Green; "and that one half of the same may be decreed to be paid over by the parties now holding the same in any of their said capacities to the plaintiffs according to their interests therein," and for other relief.

There are also allegations that Meltiah B. Green never filed in the Probate Court an inventory of the trust estate, and never filed in that court an account of the trust; and that Gaskill has never filed an inventory of the trust estate, and that he has not included in his trustee's account filed on June 29, 1896, the part of the trust fund which Meltiah B. in his lifetime wrongfully appropriated to his own use.

In the Probate Court Gaskill appeared as trustee and as executor, and answered, denying any misappropriation of any part of the trust fund by Meltiah B. Green, and denying that as executor of the will of Mary S. Green he has any funds belonging to or impressed with the trust, and alleging that he has duly filed in the Probate Court his final account as trustee of the fund, and that the same has been finally and conclusively allowed in the Probate Court; and also demurring to the bill because the plaintiffs have a full, complete, and adequate remedy at law by proceedings in the Probate Court upon the accounts of the defendants, and by suits, as well as because of the laches of the plaintiffs, and because the bill is multifarious. The

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cause was heard upon the demurrer in the Probate Court upon its equity side, and the demurrer was there sustained and a decree entered, dismissing the bill with costs, in favor of the defendant Gaskill as trustee and as executor. From this decree the plaintiffs appealed to the Supreme Judicial Court, and the case was then heard by Mr. Justice Knowlton upon the bill and the demurrer of the defendant Gaskill, and was reserved for the consideration of the full court.

It is to be noticed that the bill contains no allegations stating the nature of that part of the trust property alleged to have been misappropriated by the first trustee to his own use, and to be now in the hands of Gaskill as executor of the will of Mary S. Green, nor does it allege that that property was so ear-marked as to be capable of identification. Nor does the bill allege that any part of the trust property is in fact now in the hands of Parker as administrator *de bonis non* with the will annexed of the first trustee.

While the Probate Courts in the several counties have equity jurisdiction over all cases and matters relating to trusts created by will, St. 1891, c. 415, § 1, and have long had equity jurisdiction over all matters relating to the termination of such trusts, St. 1880, c. 163; Pub. Sts. c. 141, § 27, this is a concurrent jurisdiction shared by the Superior Court and by this court. While the fact that in the records and files of the Probate Courts are found the wills under which such trusts arise and the inventories and accounts of the trustees, with their official bonds, the proceedings under which they were appointed and other matters affecting the trust, may perhaps have been a reason for conferring this concurrent jurisdiction in equity upon the Probate Courts, it does not enlarge that jurisdiction, or enable them to entertain any bill which could not also be entertained by the Superior Court or by this court. Nor does it enable a Probate Court upon its equity side to do any of those things upon a bill in equity, with reference to such a trust, which can be done by a Probate Court under its probate jurisdiction only. See *Bennett* v. *Kimball*, *ante*, 199.

If the defendant Gaskill had in his hands as executor of the will of Mary S. Green property of the trust which could be identified and followed as belonging to the trust, the trust hav-

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ing now terminated by its own limitation and the plaintiffs being entitled under the will of its founder to an interest in the property as their own, they might no doubt in a proper bill brought in any competent equity court, reach that property and recover their interest in it. *Holland* v. *Cruft*, 20 Pick. 321, 326. *Moore* v. *Hazelton*, 9 Allen, 102. So also, if as trustee of this trust he has in his hands property of the trust which so belongs to the plaintiffs, they may, when the amount for which he is liable as trustee has been determined by the proper tribunal, by a proper bill in any equity court having jurisdiction of the parties compel him to pay to them their share of the property. But it is a settled principle of our law that trustees appointed by a Probate Court, as well as guardians, administrators, and executors so appointed, have a right to have their accounts adjusted and the amounts due to or from them as trustees determined in the Probate Court, on its probate side, and in the usual probate proceedings; and that they cannot be compelled first to render their accounts, or made to pay over the fund, by proceedings in equity or at law, save after and in pursuance of such an adjustment and determination on the probate side of the court. *Jennison* v. *Hapgood*, 7 Pick. 1, 7. *Conant* v. *Kendall*, 21 Pick. 36. *Wilson* v. *Leishman*, 12 Met. 316. *Sever* v. *Russell*, 4 Cush. 513. *Brooks* v. *Brooks*, 11 Cush. 18. *Munroe* v. *Holmes*, 9 Allen, 244. *Prentice* v. *Dehon*, 10 Allen, 353. *McLane* v. *Curran*, 133 Mass. 531. *Foster* v. *Foster*, 134 Mass. 120. *Murray* v. *Wood*, 144 Mass. 195. *Ammidown* v. *Kinsey*, 144 Mass. 587. *Thorndike* v. *Hinckley*, 155 Mass. 263. *Foster* v. *Bailey*, 157 Mass. 160. *Tyler* v. *Wheeler*, 160 Mass. 206, 210. See also *Southwick* v. *Morrell*, 121 Mass. 520.

While the bill alleges that the defendant Gaskill has filed an account of his trust, it is silent as to the action of the Probate Court upon that account, and even if it has been there disposed of, it is certain that the plaintiffs do not here seek to recover of him upon the basis of that account or of any determination of the Probate Court upon it, because the bill alleges that that account does not include that part of the trust property which had been misappropriated by the first trustee, and which it alleges is now in Mr. Gaskill's hands in another capacity than as trustee, while the bill seeks to recover the plaintiffs' share of

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that part of the fund, as well as of the property which is conceded to belong to the trust. The bill cannot be maintained as if it were one to compel the defendant Gaskill as trustee to pay to the plaintiffs their share of a fund, the amount of which in his hands has been determined in accordance with his right in probate proceedings, because the bill does not contain the necessary averments. It cannot be maintained to charge him as trustee with the part of the fund which it alleges was diverted from the trust by a former trustee, because he can be charged with liability in his capacity as trustee, with reference to that part of the fund, only by showing a neglect of his duty as trustee to recover the trust property so diverted. It is his right to have that question determined in the Probate Court, upon its probate side, or by a suit upon his official bond as trustee. The plaintiffs upon the statements of the bill have such an interest as would at all times have enabled them to be heard upon the settlement of the accounts of the trustee, to petition for his removal, or to ask that his official bond be put in suit.

Nor are the circumstances such as to require a court of equity to allow the plaintiffs to pursue the same bill against this defendant in his two capacities of trustee and of executor. There are questions as to the rights of the plaintiffs as against the trust with which the estate of Mary S. Green is not concerned, and the bill cannot be treated as if it were merely an attempt to follow and recover from her estate identified trust funds.

The allegations that the former trustee filed no inventory and that he filed no account, and that the defendant filed no inventory as trustee, do not give the plaintiffs a right to equitable relief. It is therefore unnecessary to consider whether the joining of the defendant Parker or the alleged laches of the plaintiffs are also good grounds of demurrer, and on those questions we express no opinion.

For the reasons stated the demurrer should be sustained and the bill dismissed with costs. But as it is conceded that there is a trust fund in which the plaintiffs are interested although they cannot maintain this bill, the decision should be without prejudice to their rights, if any, in the fund. There should be a decree in the court below sustaining the demurrer and dismissing the bill with costs as against the defendant Gaskill, but

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without prejudice to the plaintiffs' rights, if any they have, in the trust fund under the will of John Green, held originally for the benefit of Meltiah B. Green, and terminated by its own limitations by the death of Mary S. Green.

So ordered.

J. Green & F. P. Goulding, for the plaintiffs.
H. Parker, for the executor.

JOSEPH L. HANKINSON *vs.* LYNN GAS AND ELECTRIC COMPANY.

Essex. November 8, 1899. — February 28, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Personal Injuries — Master and Servant — Action — Evidence.

In an action against an electric corporation for personal injuries occasioned to the plaintiff by being struck in the eye, as he was driving along a street, by a burnt carbon thrown by A., who, as a servant of the defendant, had removed it from a lamp for the purpose of replacing it by a new carbon, A. testified that he ordinarily dropped the disused pieces of carbon somewhere near the base of the post on which the lamp was; that if there was any good reason why he could not drop them there, he tossed them out into the street; and that he intended to be careful not to drop them on a passer by. He further testified as follows: "I wanted to attract his attention so as to speak to him, and I threw the carbon at the team so as to attract his attention, so that I might speak to him, and not for any business connected with the company." *Held*, that it was a question for the jury whether the explanation given by A. of the purpose which he had in throwing the carbon was true or not. *Held, also*, that the evidence of a witness, who testified that A., when taxed by the plaintiff with having through carelessness injured his eye, said, "I am sorry; it was an accident; I did n't mean to do it," was rightly admitted.

TORT, for personal injuries occasioned to the plaintiff by being struck in the eye by a burnt carbon thrown by one Bayrd, who was in the defendant's employ. At the trial in the Superior Court, before *Richardson*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. Lowell & J. H. Pearl, for the defendant.
J. H. Sisk, for the plaintiff.

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LORING, J. The defendant requested the presiding justice to direct a verdict for the defendant, and excepted to his refusal to give that ruling. This was the only ruling requested and this is the only exception taken in connection with the charge of the judge. The jury were instructed that if the carbon which struck the plaintiff in the eye was thrown by Bayrd "for the purpose of carrying out and performing his duty in his employment," the defendant was liable, and, on the other hand, if the carbon was thrown by Bayrd "to carry out some whim of his own, in accordance with some impulse of his own, and not for the purpose of carrying out or accomplishing the purposes for which he was then and there employed, the defendant would not be liable." This was in accordance with the rule laid down in *Howe* v. *Newmarch*, 12 Allen, 49, which has been followed and acted upon in many subsequent cases. This is admitted by the defendant, and no exception is taken to this ruling. The only contention made by the defendant is that there was no evidence on which the jury could find that the carbon was thrown by Bayrd for the purpose of performing the work he was hired by the defendant to perform.

But if the jury disbelieved Bayrd's explanation of the purpose which he had in mind in throwing the carbon there was ample evidence that the carbon was thrown by Bayrd in performance of the work he was hired to perform. He was hired to remove the remains of the four carbons left in the lamp in question after it had burned during the preceding night and to replace them by four new carbons for the coming night. The plaintiff was struck as he was driving by, and just outside of, the defendant's cart, which Bayrd had left standing at the foot of the pole on which he was at work discarding the old carbons. These carbons are discarded by being dropped or thrown into the street. Bayrd testified, "I ordinarily drop these disused pieces of carbon somewhere near the base of the post on which the lamp is. If there is any good reason why I cannot drop them there, I toss them out into the street. I intend to be careful not to drop them on to a passer-by or to strike a horse as he is driven along by that pole." This warranted the jury in finding that the carbon which struck the plaintiff in the eye was being discarded by Bayrd in the performance of the duty which he was hired by

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the defendant to perform, and in finding for the plaintiff under the rule stated in the charge to the jury.

The defendant's contention is that Bayrd's statement — "I did not throw it at the team for any purpose connected with my business, but to attract his attention. I wanted to attract his attention so as to speak to him, and I threw the carbon at the team so as to attract his attention so that I might speak to him and not for any business connected with the company" — is conclusive upon the jury and the plaintiff; but when the defendant's liability depends upon the purpose with which an act, that is nearly neutral so far as outward manifestations are concerned, is done, it would be strange if the jury were not at liberty to disbelieve the testimony of one employed by the defendant as to his mental processes. In that connection it was proper for the jury to take into consideration the fact that not only was this witness at the time of the trial in the employ of the defendant, but also that he had been taken back into its employ only two weeks before the trial; and the jury may have also believed that from the terms in which his testimony was couched it was evident that the witness had a particular knowledge of what the law required to exonerate the defendant from liability. We are of opinion that it was a question for the jury whether the explanation given by Bayrd of the purpose he had in throwing the disused carbon was true or not. *Merchants' National Bank* v. *Haverhill Iron Works*, 159 Mass. 158. *Commonwealth* v. *McNeese*, 156 Mass. 231. *Twombly* v. *Monroe*, 136 Mass. 464.

The question whether the testimony given by Foss should have been admitted is a close one, but on the whole we are of opinion that it was rightly admitted. It seems to us, on the whole, that it was more natural for a man in Bayrd's position, when taxed by the plaintiff with having through his carelessness nearly, if not quite, caused the loss of his eye, to answer that he was tossing the carbon at his cart to attract his attention and that he, the plaintiff, unexpectedly thrust out his head at just the wrong time, than it was to say, "I am sorry; it was an accident; I didn't mean to do it," and not to give the explanation which he now testifies to.

The presiding justice carefully limited the use to be made of the evidence when it was offered and admitted, and if the defend-

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ant desired that further instructions should be given on the point in the charge to the jury, (as it was intimated by the judge he should do, when the evidence was admitted,) his counsel should have called it to the attention of the judge; and not having done so, and not having excepted for that reason to the charge given, has now no ground for complaint. *Exceptions overruled.*

TERENCE O'BRIEN *vs.* ELLEN F. KEEFE & another.

Essex. November 8, 1899. — February 28, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Equity Practice — Master's Report — Exceptions — Evidence.

The only purpose served by exceptions to a master's report in equity is taking an appeal to rulings made by him. The statement of what rulings were made by the master must appear in his report or otherwise on the record of the cause, and any statement of them in the exceptions will be disregarded as impertinent.

If exceptions are taken to rulings alleged to have been made by a master in a cause heard by him under a decree directing him to hear the cause and find the facts, and the record does not disclose that the rulings alleged to have been made were made by the master, the exceptions must be overruled.

If testimony identifying a witness as the person who was convicted of a crime, the details of which are stated, is admitted *de bene* by a master at the hearing before him, on the counsel introducing the testimony stating that he expects to introduce a record of the witness's conviction of the crime in question, and such record is not produced and no motion is made to have the testimony ruled out, and the master, in a supplemental report made under an order recommitting the cause to him and directing him to state what action he took as to this evidence, states that, in considering the evidence in the case, he treated this testimony as if it had been ruled out, and that neither counsel referred to it in the argument of the case in which they discussed the weight of the witness's testimony and his character, an exception taken to the admission of the evidence *de bene* is properly overruled.

At a hearing before a master, the chief of police of a town was summoned as a witness for the purpose of procuring the records of a trial justice which were not forthcoming. On his testifying to his ignorance of the records, he was asked, "Have you got any papers with you?" and he testified, "that he had his day-book." He was then asked if he had known a certain witness for a good many years, and he testified that he had known him "quite a number of years." This was objected to. The master, in the supplemental report mentioned above, stated that this testimony, together with the testimony as to the identity of the witness, was not considered by him or referred to in argument, and was treated as ruled out. *Held*, that the plaintiff did not show that he was prejudiced by the admission of the testimony.

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It is proper for a master in equity to whom a cause has been recommitted as stated above, to state in a supplemental report that he treated certain evidence as ruled out which was admitted *de bene* and not subsequently made good, and which the objecting party neglected to move should be ruled out.

BILL IN EQUITY, filed in the Superior Court, to have a trust declared for the benefit of the plaintiff in certain property devised by his father to the first named defendant. The case was referred to a master, and afterwards was recommitted to him. A decree was entered, overruling the plaintiff's exceptions to the original and supplemental reports of the master, confirming the reports, and dismissing the bill; and from the order of recommittal and the decree the plaintiff appealed to this court. The facts appear in the opinion.

F. H. Tarr, for the plaintiff.

H. P. Moulton & C. A. Russell, for the defendants.

LORING, J. This case comes up on two appeals taken by the plaintiff one from an order of the Superior Court recommitting the cause to the master to whom it was originally sent, and the other from a decree overruling exceptions to the master's original and supplemental reports. The plaintiff has undertaken to present to this court questions as to the admission and rejection of testimony offered at the original hearings before the master, questions as to the refusal of the master to incorporate in a supplemental report certain alleged facts, and to strike out from that report certain statements contained therein. The way in which these questions are presented is by a paper drawn up as a bill of exceptions is drawn up at law, stating the rulings of the master, the evidence on which they were based, the grounds taken by the plaintiff in objecting thereto, and concluding with the statement that the plaintiff is aggrieved and with a prayer that his exceptions be allowed. The plaintiff evidently supposed that exceptions to a master's report in equity and a bill of exceptions in an action at law were one and the same thing and served the same purpose; while the fact is that they are quite different things and serve widely different purposes.

Bills of exception in actions at law were introduced by statute (13 Edw. I. c. 31) for the sole purpose of incorporating into the record rulings made by the judge while presiding at the trial of the cause; at common law these were no part of that record.

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The sole purpose served by an exception to a master's report in equity is to take an appeal from a ruling, which is stated in the record of the suit in equity, to wit, the master's report. The bill of exceptions at law is an addition to the record, and when the record was thus completed, the appeal was originally taken by suing out of the appellate court a writ of error, bringing the record, including the bill of exceptions, before the appellate court for revision; and such was the practice in Massachusetts, until the present statutory process of entering the exceptions in the appellate court was instituted by St. 1820, c. 79. For an early case in Massachusetts where a bill of exceptions was sealed in the Court of Common Pleas, under Statute Westminster 2, 13 Edw. I. c. 31, and the question so spread upon the record was carried to this court by writ of error, see *Cogswell* v. *Dolliver*, 2 Mass. 217. An exception to a master's report in equity serves the same purpose as that formerly served by the writ of error and now served by entering a bill of exceptions under the statute; it is the act of appealing from rulings appearing of record, and nothing more. It ought not to contain any statement of what those rulings are, and any such statement incorporated in an exception to a master's report in equity must be disregarded as impertinent.

In the case at bar, the master states in his report: "I settled the foregoing draft of my report, which being read to the counsel, they made no objections to the report of the evidence, but the plaintiff made, then and there, the same objections to my admission and refusal to admit evidence offered by them at the hearing which they made at the hearing, which are stated in the report of the evidence." The report of the evidence has not been printed, and in the absence of that portion of the record, few of the exceptions taken by the plaintiff would present to this court any question were it not that in the order recommitting the cause to the master, the Superior Court refers to "the questions objected to and excepted to by the plaintiff, as the same appear in the bill of exceptions of the plaintiff, and numbered 3, 4, 5, 6, and 7." We think that we must take this action of the Superior Court, which had before it the report of the evidence containing a statement of the rulings made by the master, as an adoption by it of the plaintiff's

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statement of what the master's rulings were, and we shall treat it as such.

1. Exceptions 3, 4, 5, and 6 are exceptions taken to questions put by the defendants on the cross-examination of John E. Sullivan. John E. Sullivan was the principal witness for the plaintiff, and especial importance attaches to the admission of these questions, because the issue between the parties depended upon the credibility of the witnesses on the one side and on the other. On his cross-examination, against the objection of the plaintiff, the defendants were allowed to ask Sullivan if he was the Sullivan (1) who was convicted of being drunk about July 16, 1887; (2) who some time after was arrested by Mr. Savage and fined for an assault; (3) who was arrested for indecently exposing his person, and tried and convicted; (4) who was fined for being a common drunkard, upon which he was committed to Salem jail. The plaintiff objected that until the court record was produced, such questions could not be asked, and stated that there were no such records, that the defendants knew there were no such records, and asked the questions for the sole purpose of confusing and discrediting the witness.

Upon the first hearing upon the plaintiff's exceptions to the master's report, the cause was recommitted to the master to state what action he took in regard to the admission of this testimony and that of James W. Bradley, the chief of police, as set forth in exceptions 3, 4, 5, 6, and 7.

Two so-called supplemental reports of the master have been printed in the record, each without date; we infer that the first is the draft report, (which is no part of the record of the suit and should not have been signed or filed,) and that the second, in the order of printing, is the master's supplemental report. A statement with respect to this evidence is made in both reports, and, though they are not identical, they do not differ in substance. In the last report, the master states: "The defendants' counsel said he was informed and believed there were such records and he would produce them and put them in. I admitted the evidence, understanding that unless the records of conviction were produced and put in evidence, the testimony would not be used and would be stricken out. The testimony of James W. Bradley was admitted some time after

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the plaintiff's counsel had stated that he had made search for the records of the trial justice at Rockport and could not find any of his records, and said to the defendants' counsel that he might make any search or inquiry about these records that he thought best, but I did not find that plaintiff waived any rights by this offer. The defendants did produce a record of the conviction of said Sullivan for an assault and his commitment to the House of Correction in 1886, and put the same in evidence, but not the one inquired about as set forth in the plaintiff's bill of exceptions. The defendants failed to produce the records of conviction in the cases named in the plaintiff's exceptions, and neither party called the master's attention to this testimony before the case was closed, and this testimony was not formally stricken from the record. Counsel for the plaintiff and defendants, in their arguments of the case, discussed the weight of John E. Sullivan's testimony, and his character, but neither of them alluded to the evidence objected to by the plaintiff as set forth in his exceptions numbered 3, 4, 5, 6, and 7. In preparing my report on file in this case, I considered all this testimony which was not supported by the records as though it was stricken out of the case, and did not use or consider it in preparing my report."

It was within the discretion of the master, in determining the order in which the evidence should be introduced, to allow the defendants, upon their counsel stating that he expected to introduce the records of the witness's conviction, to interrogate the witness *de bene* as to whether he was the Sullivan described in the record to be subsequently put in evidence, and it was the right of the plaintiff, upon the defendants' failing to produce the record, to have that testimony so admitted *de bene* ruled out. In the case at bar, no motion to that effect was made by the plaintiff, and the master states that, in considering the testimony, he treated the evidence as if it had been ruled out and that neither counsel referred to this evidence in their arguments of the case, in which they discussed the weight of Sullivan's testimony, and his character.

Such questions as were put to Sullivan may well have confused him, and in this case, which depended upon the credibility of the witnesses on one side or the other, the plaintiff may

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have been injured by the direction thus given by the master in passing upon the order in which the evidence should be introduced; but the possibility of testimony admitted *de bene* not being subsequently made competent is one of the considerations to be passed upon by the presiding magistrate in determining whether to admit such evidence at the time it is offered or not; and it is necessary, in the conduct of trials, that such discretion should be exercised; if evidence admitted *de bene* is not subsequently made good, the only remedy that can be given is, on the proper application being subsequently made, to rule out the testimony. Whether, in such a case, the party, who produces the witness whose testimony has been confused, or the party who has undertaken to assert that the witness is not to be believed because he is a criminal, and it turns out that that assertion is unfounded, is the greater sufferer, is open to question; if he has suffered an injury, it is one inherent in the trial of causes and it is well settled, when such evidence is admitted in a jury trial, that the objecting party cannot be heard to complain, if the evidence is ruled out and the jury are instructed to disregard it. *Smith* v. *Whitman*, 6 Allen, 562. *Selkirk* v. *Cobb*, 13 Gray, 313. *Whitney* v. *Bayley*, 4 Allen, 173. *Commonwealth* v. *Ham*, 150 Mass. 122. So in a hearing before a master, if the testimony is ruled out, it is the duty of the master to disregard it; and a master in chancery, being a person learned in the law, must be taken to disregard evidence thus ruled out, and the objecting party cannot be heard to complain. In the case at bar, the evidence was not formally ruled out, because the plaintiff did not ask to have that done, and, in the absence of such a request on the part of the plaintiff, it was proper for the master to report to the court how the evidence was treated by him. As to the plaintiff's particular complaint that the master was no longer an unbiassed tribunal, the plaintiff had the opportunity of submitting the finding in favor of the defendants on the whole evidence to the Superior Court; and by his ninth exception he exercised that right and had his case heard by an unbiassed tribunal. It is true that the unbiassed tribunal did not hear the case as it would have heard it, had Sullivan not been confused by questions based on unfounded reflections on his character; but whoever is the

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greater sufferer from that, it is a misfortune — if it be a misfortune — necessarily incident to the conduct of trials by human agencies.

We are, therefore, of opinion that exceptions 3, 4, 5, and 6 were properly overruled.

2. The next exception is to the testimony of the chief of police of Rockport, who was asked whether there were any records about Sullivan and testified that he did not know whether there were any court records. He was thereupon asked, "Have you got any papers with you?" and he testified, "I have got my day-book that I used to keep." He was then asked whether he had known Sullivan for a good many years, to which he replied, "Quite a number of years." The plaintiff, in his bill of exceptions, states that he excepted to the admission of this testimony on the grounds on which he excepted to the questions asked Sullivan on cross-examination, and on the "further ground that this was an attempt to prejudice the court against the witness and to affect his credibility by testimony that the chief of police had private records in his day-book concerning the witness, in place of the proof of records required by law." It is a fair inference from the master's supplemental report, already quoted, that the purpose of these questions to the chief of police as to the records was an effort to get the court records which it appears from the master's supplemental report could not be found. Why the defendants asked the chief of police, when they found that the latter had no records, if he had known Sullivan for a good many years; and why he was allowed to answer that he had known him quite a number of years, — is not explained by the fact that the defendants were trying to get the records of the court. But in view of the fact that this testimony was not considered by the master or referred to in the argument and was treated as ruled out, and of the further fact that the witness had been convicted of an assault and committed to the house of correction, we do not think that he was prejudiced by its admission.

3. There is nothing before this Court showing in what the rulings of the master consisted which were excepted to by the defendants in the first, second, eighth, and ninth exceptions to the master's original report and in the first, second, and third excep-

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tions to his supplemental report.* If the master did make the rulings stated in the defendants' first, second, and eighth exceptions to the original report, we think that the rulings were right. If it be true (1) that the master made the statement set forth in the plaintiff's first exception to the supplemental report, and (2) that the defendants' counsel did address to the master, at the hearing under the order recommitting the cause to the master, the argument set forth in the second exception to that report, and (3) that the law underlying the suit was argued at that hearing and was considered by the master in making his supplemental report, the remedy of the plaintiff was to reargue

* The first exception to the original report was to the exclusion of evidence offered by the plaintiff to show that he had paid certain bills for taxes, repairs, and improvements on the property in question.

The second exception was to the admission in evidence of a portion of a letter written by the plaintiff to the defendant, and identified by the plaintiff, on cross-examination, as being in his handwriting.

The eighth exception was to the exclusion of evidence offered by the plaintiff to show that during the time when the defendant claimed to have been supporting the testator, the latter was trying to hire money of the defendant's husband for the purpose of supporting himself.

The ninth exception was on the ground that the master's findings were against the evidence and the weight of the evidence.

The first exception to the supplemental report was to the refusal of the master to insert therein "the following finding of fact, namely, that the master had stated to counsel, after filing his finding, that he considered John E. Sullivan a truthful witness, and all the other witnesses in the case truthful, and that the ground of his decision did not render it necessary to find any one guilty of untruthfulness, and that said statements were, as a matter of fact, true."

The second exception was to the master's refusal to insert in the supplemental report "the following finding of facts, namely, that the counsel for the defendants addressed to the master at the supplementary hearing an argument substantially as follows: That the answers of the witness Sullivan to the questions objected to (Exceptions 3, 4, 5, 6) were shuffling and stumbling answers, that there was nothing in the case to show that these offences had not been committed by the witness, that it was unfortunate that the records had been lost, but it was not the fault of the defendant, and that no injustice was done by throwing out the testimony of said Sullivan as worthless and unreliable."

The third exception was to the master's refusal "to insert in his report the following finding of fact, namely, that counsel argued the law underlying this suit in equity before the master, and submitted briefs of the same for his examination."

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the question of fact before the Superior Court on the report of the whole evidence; and this, it would seem from the ninth exception to the master's original report, the plaintiff has done. These exceptions were properly overruled.

4. For the reasons already stated, we are of opinion that it was proper for the master, in his supplemental report, to state how he treated the testimony of Sullivan on cross-examination and the testimony given by the chief of police in direct examination; this was the evidence previously spoken of by us, admitted *de bene*, which was not subsequently made good and which the plaintiff neglected to have stricken from the record. The fourth and fifth exceptions to the master's supplemental report were properly overruled.* Assertions of counsel are improperly added to each of these questions, and are not before this court.

The order of the Superior Court recommitting the cause to the master and the decree of that court overruling the plaintiff's exceptions to both reports of the master and dismissing the bill of complaint were correct.

Both appeals must be dismissed. The decree of the Superior Court confirming the report of the master and dismissing the bill must be affirmed.

Decree accordingly.

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* The fourth exception was to the master's refusal to strike from his report all statements therein as to his understanding and interpretation of the record.

The fifth exception was on the ground that the statement of the master in his report that he did not use or consider the evidence objected to and recited in exceptions numbered 3, 4, 5, 6, and 7, in preparing his report, was contrary to the record.

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CITY OF BOSTON *vs.* JOHN J. COON & another.

Suffolk. November 13, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

City — Joint Tortfeasors — Negligence — Action — Evidence.

A city, which has paid a judgment obtained against it in an action for injuries occasioned by a defect in a highway caused by acts and omissions for which a third person was answerable, may recover over against such person, although the city was negligent in failing to keep the way in a safe condition.

In an action by the city of Boston, a book was produced which purported on its title-page to be the "Revised Ordinances of 1895 of the City of Boston, as passed and approved December 14, 1885, with amendments thereto, passed and approved, to May 1, 1886, . . . published by order of the City Council." Upon the next page appeared the statement of the order for printing approved February 10, 1886, and at the end an attestation signed by the city clerk. *Held*, that no error appeared in the admission of the ordinance.

TORT, to recover the amount paid by the plaintiff upon a judgment obtained against it by one Blessington in an action for personal injuries caused by a defect in a highway. Trial in the Superior Court before *Bell*, J., who directed the jury to return a verdict for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

J. P. Sweeney, for the defendants.

S. M. Child, for the plaintiff.

HAMMOND, J. It is true, as claimed by the defendants, that the judgment in the suit of *Blessington* v. *Boston*, 153 Mass. 409, is conclusive against them only on three points, namely, that the highway was defective, that Blessington was in the exercise of due care, and that he suffered damages to the amount he recovered; and, if the evidence for the plaintiff had stopped there, it could not have been ruled as matter of law that the defendants were answerable over to the plaintiff.

But the evidence did not stop there. It further appeared as undisputed facts that the defendants were engaged in the construction of a building upon a lot of land abutting on Causeway Street in the plaintiff city, and under a permit issued by the city had excavated, for the purpose of connecting the building with a

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sewer, a trench extending from the building across the sidewalk into the street and under the tracks of the West End Street Railway Company, which were duly located in the street; that as a protection to public travel the defendants had erected barriers upon both sides of the trench, consisting of board fences extending across the sidewalk and for a short distance into the street, and two large wooden horses, about fifteen feet in length, extending from the end of the fences beyond the end of the trench; that twenty of the cars of the West End Company passed over the trench every hour, and the street railway company, in order to continue running its cars, had placed two of its employees at the trench, whose duty it was to move the wooden horses whenever it was necessary for the street railway cars to pass over it; and that the existence of the trench, the fact that it had been open for a week before the accident, the method of barricading, the frequency of the trips made by the street railway company, and the manner of removing the wooden horses by its employees, were known both to the officers of the city and the defendants, and no objection was made by the city.

It further appeared that at about seven o'clock on the evening of September 20, 1889, Blessington, while walking along the sidewalk, reached the fence and turned and walked into the street at the end of the fence; that at that instant one of the employees of the street railway was engaged in swinging around one end of the wooden horses in order to admit of the passage of a car, and in doing so momentarily left an opening between the other end of the wooden horse and the fence, and Blessington passed through the opening and fell into the trench and received the injuries for which he recovered judgment against the city; that on the ends of the fences and on both ends of the horses there were lanterns, six in all, which were lighted and burning; and that an employee of the defendants, who was stationed as a night watchman in the building, was standing near the trench.

It thus appears that the trench was excavated by the defendants. It was incumbent upon some one to keep it properly guarded, and that duty rested upon the defendants. *Fisher* v. *Cushing*, 134 Mass. 374. If the passage of the street cars made it necessary to remove and replace the wooden horses frequently,

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that fact was known to the defendants, and they could not relieve themselves from responsibility by leaving to other persons that part of the work of guarding the trench. Whether that part of the work be done by them, or by others with their knowledge, they are equally answerable.

It is well settled that the negligence of the city to fulfil its statute duty to keep the street in safe condition in a case like this is no bar to recovery. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24. *Holyoke* v. *Hadley Co.* 174 Mass. 424.

The judgment and the undisputed facts therefore show that Blessington was in the exercise of due care; that he was entitled to the damages he recovered; that the highway was defective, and that the defect was caused by acts and omissions for which the defendants were answerable; and that the negligence of the plaintiff is no bar to the action. This makes out a case for the plaintiff.

The admission of the ordinance was not error. The book produced on its title-page purported to be the "Revised Ordinances of 1885 of the City of Boston, as passed and approved December 14, 1885, with amendments thereto, passed and approved, to May 1, 1886. . . . Published by order of the City Council." Upon the next page appears the statement of the order for printing approved February 10, 1886. Taking the language of the title-page and of the vote and the attestation and considering them together, the court may have found that the attestation was intended to cover the whole book.

This was the only point argued concerning the admission of the ordinance.

Exceptions overruled.

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CHARLES SMITH *vs.* T. JOSEPH BEAUDRY.

Middlesex. November 13, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Master and Servant — Assumption of Risk — Action — Evidence.

A person, who has been employed in one die-shop for eleven months, during which he was engaged in grinding for one-third of the time, including, during a part of that time, "truing" the grindstone, and who has worked for the defendant for eight months, and during that time was employed in grinding dies and "truing" the grindstone whenever there was any grinding to be done, will be held to have assumed the risks arising from the position of the stone in relation to the rest which supported the "truing iron" and from the facts that there was a spring to the rest, that the straps of the groove in the top of the timbers were loose, that the threads of the nuts screwed on the tops of the bolts attached to the ends of the rest were worn, and that he was furnished with a gas pipe in place of a quarter-inch wire, or a roll, for use in "truing" the grindstone, and such a person cannot maintain an action against his employer for injuries sustained, while "truing" the stone, by having his hand carried with the point of the pipe down between the rest and the stone, though there is evidence that he is not an experienced grinder.

The facts, that when a person suing for an injury, who previously had been employed to work on a grindstone, was employed a second time, four months after his first employment terminated, he was employed not to grind but to help the finishers, and that it was not until three months later that he was set to grinding, do not take his previous experience out of the case; and the danger arising from the stone being swung over five inches above the beams on which the rest supporting the die travelled, is an obvious risk of his employment assumed by him.

In an action for personal injuries sustained while working on a certain machine where the above facts were disclosed, the question whether a person who formerly worked on the machine did or did not do something for the purpose of making it safer when using it, is immaterial and properly excluded.

Where the risk arising from the position of a machine is obvious and must be held to have been assumed by a workman using it, it is of no consequence that the business might have been conducted more safely by his employer.

TORT, for personal injuries sustained by the plaintiff while in the defendant's employ. Trial in the Superior Court, before *Hardy*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. J. Shaughnessy, for the plaintiff.

J. W. McDonald, for the defendant, was not called upon.

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LORING, J. In this action the plaintiff seeks to recover for losing three fingers of his left hand in "truing" a grindstone while in the defendant's employ. The defendant is a manufacturer of cutting-dies. Cutting-dies while in the process of being manufactured are ground down on a grindstone; the stone is thereby worn away and its surface becomes uneven. "Truing" a stone is grinding it down again until its surface becomes uniform and even.

The plaintiff worked for the defendant from May, 1895, to September, 1895, and from January, 1896, until he was hurt on May 9th of the same year. Before going to work for the defendant in 1895, the plaintiff had worked in die-shops at different times for two years and a half in all; for eleven months, ending April, 1895, (a month before he first went to work for the defendant,) the plaintiff had worked in the Brockton Die Company's shop, and had been employed there in grinding about one third of the time; and during the latter part of the time that he was grinding for that company, he did the work of "truing" the grindstone used by him.

When he first applied for work at the defendant's factory, he was told by the defendant's brother "that all they wanted a man for was to do grinding." He accepted the employment so offered and was set to work grinding the first day, and during the succeeding eight months in which he worked for the defendant whenever there was any grinding to be done he did part of it.

When the plaintiff re-entered the defendant's employ in January, 1896, he was employed helping the finishers on the floor, and continued in that work until April 11, when one Laverdreu, who was an experienced grinder and up to that time had been working on the grindstone which caused the accident in question, left the defendant's employ. The plaintiff was then set to work on this grindstone and continued on that work until one McDonald came. McDonald stayed but a week, and when he left, the plaintiff returned to this work.

The grindstone in question revolved on an axle set in metal boxes supported on heavy horizontal timbers. There was a rest to support the die, when held against the stone to be ground, which extended crosswise from one timber to the other and could be moved forward or back as the size of the die required. At

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each end of the rest was fixed a bolt, which ran in a groove in the top of the two timbers, which supported the grindstone. Each one of these grooves was strapped with a strip of iron. The top of each bolt attached to the ends of the rest terminated in a thread on which was screwed a nut. By screwing down the two nuts the rest was fastened firmly in the position in which the operator desired it to be and held there by the iron strapping on the grooves in which the bolts ran.

Grindstones are "trued" by a workman holding against the surface of the stone as it revolves an iron or wire in such a position that the elevations constituting the inequalities on the face of the stone come in contact with the iron or wire and are thereby worn down; the surface of the stone is thus made uniform. The iron or wire is held in position by holding it firmly on the rest which has been described.

In the case at bar, the plaintiff was "truing" a grindstone by holding against it a piece of iron gas pipe about five feet in length. The stone was revolving toward the plaintiff at the rate of not less than a hundred revolutions a minute. The injury was caused by the point of the pipe being carried down between the rest and the stone, together with the plaintiff's left hand, with which he was holding the "truing" iron in position. The stone was revolving so quickly that the plaintiff could not withdraw his hand and a fellow workman, attracted by his cries, ran to his aid and pulled his hand out, but not before he was so injured that he ultimately lost three fingers.

The plaintiff contends in the first place, that the defendant is liable for this injury because the metal boxes on which the axle of the stone rested were elevated five inches and a half above the timbers on which they were supported and on which the rest travelled back and forth. It appeared that the rest was only five-eighths of an inch thick; the iron pipe, therefore, came in contact with the stone three and seven-eighths inches below the centre of the stone; and it is contended that this intensified the danger of the iron being drawn under the stone by an inequality in its surface. It appeared that the metal boxes supporting the axle of the stone had been thus raised to enable the stone to clear the floor; the stone was originally from six to seven feet in diameter, and the top of the timbers was not quite three feet from the floor level.

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When the plaintiff was first employed, in 1895, he was employed to grind on this same grindstone, and no change had been made in it since that time. The fact testified to by the plaintiff that when he was employed the second time, four months after his first employment terminated, he was employed not to grind but to help the finishers, and that it was not until three months later that he was set to grinding, does not, as the plaintiff seems to contend, take his previous experience out of the case. Under these circumstances, the danger arising from the stone being swung something over five inches above the beams on which the rest travelled was obvious to a man of his experience, and was one of the risks assumed by him in undertaking the employment of grinding at that stone.

The second ground of liability relied on by the plaintiff is that the rest was defective. The defect consisted in the fact that the iron strappings of the grooves were loose and the threads of the bolts were worn, and, as a result, there was a spring to the rest when you bore down on it with a die or a "truing" iron. But the plaintiff testified that he noticed the spring which the rest had when he first used it, in 1895, and when he first began to use it again in April, 1896, and that the rest was in the same condition in which it was on the day of the accident during the three weeks next previous thereto, during which he had been grinding upon it. Moreover, in grinding dies, the rest is moved forward and back several times each day to adjust the distance between it and the stone to the particular die to be ground. If there was any defect in respect to the loose strappings or the worn threads, they were obvious to one in the position of the plaintiff, who was grinding on this stone for three weeks next before the accident. It is not clear on the plaintiff's testimony, whether there was any evidence that the accident happened from the rest having slipped. In testifying as to how the accident happened, the plaintiff stated that he was holding the pipe about five-eighths of an inch from the stone and — "the rod caught between the rest and the stone there and drew my hand up quickly and drew me right against it." He later testified that he told the defendant "that the rest must have slipped." We have assumed in his favor that the jury might have found that the accident was caused by the slipping of the rest.

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The third ground on which the plaintiff puts the defendant's liability is that the iron with which the defendant furnished him and which he was using at the time of the accident was not a proper instrument to use in "truing" a stone. It appeared that during the three weeks next before the accident the plaintiff had been using this iron gas pipe as occasion required in "truing" the stone. It also appeared that the defendant had usually provided iron wire one quarter of an inch in diameter for use in "truing" the grindstones; this wire came in bundles twelve feet in length and the workmen cut off strips four or five feet in length when they wished to use the wire on the stone. This quarter-inch wire had given out when the plaintiff went to work on this stone on April 11, or just before, and a new supply, which the defendant had sent for, had not come. And the defendant told the plaintiff "that he would order some, and that there was some gas pipe in the grinding-room, and that that was just as good until he got some quarter-inch wire." The gas pipe used was not a defective piece of pipe; if it be true that it is more dangerous than the quarter-inch wire, or the roll, that constitutes no ground of liability to one who voluntarily agrees to work with the machinery as he found it, including the use of the gas pipe in place of the wire or a roll, in "truing" the grindstone. The plaintiff relies on the defendant's statement to him that the gas pipe "was just as good until he got some quarter-inch wire," and contends that this gave him the right to assume that gas pipe was no more dangerous than quarter-inch wire was. The only difference between the two is that the wire would bend on encountering the inequality in the surface of the stone while the pipe would not bend; but this difference is obvious to a man of ordinary intelligence, and especially to one with the experience which the plaintiff had in working on and "truing" grindstones.

The plaintiff testified that he was not an "experienced grinder," and that he had never, either before or since the accident, let himself to work as an experienced grinder. That may be true. It may be true that in grinding dies the plaintiff had not had sufficient experience to be called an experienced grinder; but it is equally true that all the defects or conditions which, alone or together, caused the injury complained of in the

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case at bar, were obvious to a person of ordinary intelligence, and that a man who had been employed in one die-shop for eleven months, during which he had been grinding for one third of the time, including, during a part of that time, "truing" the grindstone, and who had worked for this defendant for eight months, and during that time was employed in grinding dies and "truing" the grindstone whenever there was any grinding to be done, cannot be heard to say that he did not assume the risks arising from the position of the stone in relation to the rest and the timbers, from the facts that there was a spring to the rest, that the straps of the groove were loose, and the threads of the nuts were worn, and that he was furnished with a gas pipe in place of the quarter-inch wire, or a roll, for use in "truing" the grindstone.

Laverdreu's testimony was properly excluded. Whether he did or did not put something under the rest to support it while he was using it in the defendant's employ, was immaterial. If Laverdreu had done so, it would have no tendency to prove or to disprove that the defendant was negligent or that the risk was not obvious, and the evidence was objectionable as tending to confuse the jury by raising an immaterial issue, involving the actions of third persons.

The plaintiff's exception to the ruling excluding the question which the plaintiff asked of one Patten, who qualified as an expert in grinding dies, must be overruled. The question asked was, "In your opinion, is it the proper and the general way to place the axle of a grindstone for grinding dies five or six inches above the top of the frame?" As we have held that the risk arising from this position of the grindstone was obvious, and for that reason was assumed by the plaintiff, it is of no consequence that the business might have been conducted more safely by his employer.

Exceptions overruled.

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MAX HARRINSON *vs.* GEORGE F. JELLY, trustee.

Suffolk. November 14, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Defective Stairway.

If, at the trial of an action for personal injuries occasioned to the plaintiff by a defective tread on the stairs of the defendant's building, the jury would be warranted in finding that the stairway was constructed for the use in common of the persons who worked in that part of the building where the plaintiff worked, and that the plaintiff had been so informed by the authority of the defendant; that at the time of the accident the plaintiff was rightfully passing over it and in the exercise of due care; that the stairway was not in existence at the time the plaintiff or his employer, who was a tenant of the defendant, first began to occupy the building, but was constructed several months afterwards and some weeks prior to the accident; that at the time of the accident it was in a defective condition, and that the accident was due to this condition; that it was a part of the building in which the tenants had only a right of passage in common, and that the control of it was retained by the defendant; that the defendant knew or ought to have known of the defective condition in time to repair, and that his failure to repair was negligence, the defendant may be held answerable.

TORT, for personal injuries. The plaintiff contended that on July 18, 1894, while descending the stairs in a building owned by the defendant he was precipitated to the floor below and sustained injuries by reason of the negligence of the defendant, his agents and servants, in permitting a tread on the stairs to become defective and unsafe. Trial in the Superior Court before *Gaskill*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. E. Cotter & B. H. Greenhood, for the plaintiff.

C. B. Southard, (*T. Parker* with him,) for the defendant.

HAMMOND, J. The evidence upon several vital points was conflicting, but it was the province of the jury to find where the truth lay, and without reciting it in detail we think the jury would have been warranted in finding that the stairway was constructed for the use in common of the persons who worked in that part of the building in which the plaintiff worked, and that

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the plaintiff had been so informed by the authority of the defendant; that at the time of the accident the plaintiff was rightfully passing over it and in the exercise of due care; that the stairway was not in existence at the time the plaintiff or Cohen his employer, who was a tenant of the defendant, first began to occupy the building, but was constructed several months afterwards and some weeks prior to the accident; that at the time of the accident it was in a defective condition, and that the accident was due to this condition; that it was a part of the building in which the tenants had only a right of passage in common, and that the control of it was retained by the defendant; that the defendant knew or ought to have known of the defective condition in time to repair, and that his failure to repair was negligence.

If such are the facts, then the case is well within the principles laid down in *Looney* v. *McLean*, 129 Mass. 33, and several subsequent similar cases, and the defendant may be held answerable.

Exceptions sustained.

CYNTHIA BATES *vs.* INHABITANTS OF SHARON.

Norfolk. November 15, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Assessment of Tax — Remedy — Petition for Abatement — Charitable Institution.

If a part of a tax assessed to a person upon his real estate is valid, although for the balance of the real estate assessed to him he is not taxable, the remedy is by petition for abatement and not by contract for money had and received.

A life tenant may be taxed as the owner of land under Pub. Sts. c. 11, § 13.

Real estate, occupied by a charitable institution for the purpose for which it was incorporated but owned by a third person, is not exempt from taxation.

CONTRACT for money had and received. Trial in the Superior Court before *Braley*, J., who reported the case for the consideration of this court in substance as follows.

On April 23, 1894, the plaintiff made and executed to the

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Ella Reed Home, a charitable corporation duly established under the laws of this Commonwealth, a deed of certain land with the buildings thereon situated in Sharon, which deed just preceding the habendum clause contained this language, — "being the same premises conveyed to me by Samuel B. Thing, lib. 655, fol. 319, and being hereby conveyed subject to the reservations herein contained or referred to. The said Cynthia Bates, as part of the consideration of this deed, reserves the right to use, occupy and improve the dwelling house on said premises free of any rent or charge for taxes or otherwise during the term of her natural life."

On the land on May 1, 1896, and on May 1, 1897, were a house, an unfinished barn, a new house and two hen-houses. On May 1, 1896, the assessors assessed the Ella Reed Home for the real estate and buildings. Subsequently, the taxes having been found to be invalid by reason of error in their assessment, on July 25, 1898, they were re-assessed to the plaintiff Cynthia Bates, "to whom said tax ought at first to have been assessed for her interest therein."

No application was made to the assessors by the plaintiff for an abatement of the taxes after they were assessed to her. On October 18, 1898, the plaintiff paid to the collector of taxes under written protest the sum of $227.59, being in full for taxes assessed her for the years 1896 and 1897 and costs and charges on the same. On May 1, 1896, and May 1, 1897, the plaintiff was in possession of and occupied the dwelling-house. She testified that she was there as president of the "Ella Reed Home." This fact at the time of the assessment of the taxes was not known to the assessors.

The plaintiff asked the judge to rule that under the language in the deed she did not take a life estate but simply had a "license or easement" to occupy the dwelling-house. Secondly, that if she had a life estate then she could be assessed only for her interest in the dwelling-house and not for the other buildings or land outside of it; and might under the evidence recover back in this action the excess paid.

The judge refused to rule as requested and found and ordered judgment for the defendant. If the first ruling requested should have been given, then the plaintiff was entitled to recover the

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sum of $227.59 with interest from the date of the writ. If the first ruling requested should not have been given and the second ruling requested should have been given, then the plaintiff was entitled to recover the sum of $112 with interest from the date of the writ; otherwise the judgment was to be affirmed.

J. W. Spaulding, for the plaintiff.

T. E. Grover, for the defendant.

LORING, J. By virtue of a reservation in the deed, the plaintiff had a life estate in the dwelling-house and the land belonging thereto, including at least the land under it. The provision in the reservation, that the grantor's right of occupation should be "free of any rent or charge for taxes or otherwise," may have the effect of enabling her to recover from the grantee any sum which she has to pay by way of taxes or otherwise while she occupies the estate; but it does not change the nature of the interest or estate reserved to her by the deed.

The taxes on the dwelling-house and land belonging to it were legally assessed to the plaintiff, who, as owner of a life estate in possession, was the owner thereof within Pub. Sts. c. 11, § 13.

It appears that the plaintiff was taxed, not only for the land in which she had a life estate but for the land owned by the Ella Reed Home; since a portion of the taxes were properly assessed to the plaintiff, her remedy, and her only remedy, was a petition for abatement of so much thereof as should have been assessed to the Home. *Kelley* v. *Barton*, 174 Mass. 396.

This conclusion is no way modified by the testimony of the plaintiff that she occupied the dwelling-house as president of the Ella Reed Home. It was not pretended that the plaintiff had released her life estate to the Ella Reed Home, which had the remainder in the dwelling-house, so as to make the Ella Reed Home the sole owner of the house. For that reason, the only effect that can be given to this testimony of the plaintiff is that the Ella Reed Home was occupying the dwelling-house by virtue of some permission or lease given to the Home by her as the legal owner thereof for her life. In such a case, the property does not become exempt from taxation as property of a charitable institution under Pub. Sts. c. 11, § 5, cl. 3. Real estate, occupied by a charitable institution for the purpose for which it was incor-

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porated but owned by a third person, is not exempt from taxation.

It follows that both rulings requested were rightly refused, and the entry must be *Judgment for the defendant affirmed.*

ELIZA A. ROBERTS *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 20, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Railroad — Due Care — Action — Evidence.

A woman, having good sight and hearing, and intending to take a train for another station, attempted in the daytime to cross from one side of a railroad station to the other, where she could take the train, from which station there was an unobstructed view of the track to the south for nearly half a mile, and was struck by an express train coming from the south which did not stop there, and injured. In an action for her injury, she testified that she looked up and down the track, but did not see or hear anything of the train which struck her. *Held*, that she failed to show that she was in the exercise of due care; and that the fact that the baggage master at the station told her that the train which she intended to take would be along in six minutes and to go across to the other side, did not justify her in assuming that she could cross safely.

In an action against a railroad corporation for injuries caused by being struck by a train while crossing the tracks from one side of a station to the other, in which the plaintiff testifies that he noticed a freight train standing on the tracks, it is within the discretion of the judge to exclude evidence as to the situation of freight cars at other times.

TORT, for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. Trial in the Superior Court, before *Hopkins*, J., who ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. E. Cotter & B. H. Greenhood, for the plaintiff.

C. F. Choate, Jr., for the defendant.

HAMMOND, J. The plaintiff was struck by a moving train as she was attempting to cross the tracks of the defendant at its

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station in Canton. She was intending to take the train for Readville, and was crossing the track to the place from which she could take the train. The question is whether she was in the exercise of due care. The train which struck her came from the south, was an express train, and did not stop at the station. From the platform from which the plaintiff started there is an unobstructed view of the track to the south, for a distance of nearly 2200 feet. It does not appear that the view was obstructed by any cars standing on other tracks at the time of the accident. It was daylight.

The plaintiff testified that upon being told to go across to the shelter she got up and went out of the waiting-room "towards the crossing, to go to the shelter and get across, and had one foot up when she was struck. She was crossing where passengers cross from the waiting-room. She did not cross right in front of the waiting-room door, but went up the platform a piece until she came to the crossing, and then went across. She walked straight across the crossing and stepped up one step to the shelter when she was struck. . . . When she came out of the waiting-room she walked over to where the crossing was. . . . She looked up and down but did not stop. . . . She noticed a long train of cars standing there, a freight train. . . . It was standing still." She did not know whether there was a locomotive attached to the freight train, nor the size and length of the train. "She was struck as she had one foot up." As to the train which struck her she testified that she did not notice anything about it, for she neither saw nor heard it. "She heard no whistle nor nothing." She further testified that she was sixty-seven years old, had good hearing, and nothing troubled her sight.

It is plain that the train which struck the plaintiff must have been clearly in sight as she stepped from the platform to cross the tracks. If she looked as she testified she did and did not see the train, she looked carelessly. If she looked and did see it, then she was attempting to cross the tracks in front of an approaching train, in full view, which was so near as to strike her before she got across. Such an act constitutes negligence unless there be some excuse for it.

But the plaintiff contends that she was invited to cross the

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track at that time, and was therefore justified in believing that she could safely cross. She says that she had a conversation with the assistant baggage-master, as to which she testified as follows: "I asked him what time the train would be along for Readville; he said in six minutes; to go across to the shelter. That is all he said and all I said."

These words of the baggage-master were a mere statement that the train would be along in six minutes, and must be taken from the other side; it was not an assurance that no other trains would pass until the plaintiff's train had come and gone. The train was not at the station, nor did the language relieve her from the duty of looking out for herself while crossing; and it was not understood by her as so relieving her, for she testifies that she did look up and down the track as though the responsibility of caring for herself rested upon her. In this respect the case differs materially from *Warren* v. *Fitchburg Railroad*, 8 Allen, 227, and similar cases cited by the plaintiff, where there was an implied assurance that there was no danger. It is impossible to see how the plaintiff could have been hurt if she had taken proper care of herself. She failed to show that she was in the exercise of due care.

We think the court might properly exclude the questions as to the situation of freight cars at other times. Such evidence, if admitted, might lead to inquiries as to collateral matters too remote and would be as likely to confuse and mislead the jury as to help them. As to the admission of evidence of this character, much must be left to the discretion of the trial court, and we cannot say as matter of law that in this case there was error in its exclusion.

Exceptions overruled.

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J. EUGENE COCHRANE *vs.* COMMONWEALTH.

Norfolk. December 15, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Land Damages — Metropolitan Sewer — Expert — Evidence.

Where it is sought to prove the damage to property sustained by reason of a taking of the right to maintain a public sewer through it, if it appears that the land is by nature adapted for a site for dye-works or a print-mill, it is proper to allow evidence to be given as to its value for such purposes, though the land is not then used therefor, by a person who has been shown to be qualified to testify to such value by knowledge thereof derived from experience in that business; but testimony of this kind is to be admitted only when it is impossible otherwise to prove the value of the property in question.

At the trial of a petition to recover damages sustained by reason of a taking under the Metropolitan Sewer Act, St. 1895, c. 406, of the right to maintain a sewer through the petitioner's land, the petitioner's counsel said in the preliminary examination of a witness called as an expert on value, "What I am getting at here is the value of that supply of water in connection with the land — what is the value of that combination? I mean that value which is independent of the neighborhood which lies behind it. Its value for manufacturing purposes." After that eighteen questions were put to the witness and a discussion by counsel ensued before the judge ruled that the witness was qualified to testify to value; and the witness was then asked: "What is the value, the fair market value of this combination of land with the water power for the purposes of a printing business?" *Held*, that this question could not have been understood by the witness as having been qualified by the statement made by counsel in the preliminary examination.

PETITION to the Superior Court for a jury to assess the damages caused by the taking by the Board of Metropolitan Sewerage Commissioners, in behalf of the Commonwealth, under St. 1895, c. 406, of the right to maintain a sewer through the petitioner's land in Dedham. At the trial before *Fessenden*, J., the jury returned a verdict for the petitioner; and the respondent alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

J. M. Hallowell, Assistant Attorney General, for the Commonwealth.

M. Storey, for the petitioner.

LORING, J. The only exception presented in this case is that to the admission of the testimony of Kelsey L. Gilmore.

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The petition was brought to recover damages sustained by reason of a taking of the right to maintain a sewer through the land of the petitioner under the Metropolitan Sewer Act, St. 1895, c. 406. The land of the petitioner was situated on each side of a stream known as "Mother Brook," running through a channel originally constructed in 1640, and connecting the Charles and Neponset rivers, and through which a large amount of water ran from the Charles to the Neponset. The line of the Commonwealth's taking was more or less parallel with the line of the brook, and ran through the petitioner's land from one end of it to the other. The petitioner introduced evidence tending to show "that the plaintiff's property was valuable as a mill site, and that its value was largely derived from the fact that the relation between the stream and the adjoining land made it possible to send a large quantity of water by gravity through any building that might be erected on the premises; that the quantity and quality of the water supply made the site especially valuable for any manufacturing business where a large quantity of water was needed for cleansing or like purposes, such as bleaching, dyeing, and printing factory or a paper mill; that the value of a mill site for manufacturing purposes did not depend on the value of real estate for general purposes in the neighborhood, and that some of the most valuable mill sites were remote from any town. The petitioner called various expert witnesses, including manufacturers and mill engineers. The engineers testified to the injury caused to the property by the sewer taking arising from the additional difficulty and expense necessitated in the construction and location of mill buildings and the subsequent conduct of a manufacturing business."

Among other witnesses, the petitioner called Kelsey L. Gilmore, who testified that he lived in Lexington, Massachusetts, and had been engaged in the city of Somerville for forty-one years in the business of bleaching, dyeing, printing, and finishing cotton goods; that he bought the mill in which he was manufacturing in Somerville in 1878; that he never bought any other mill or mill site and never sold a mill or mill site; that he did not know of purchases or sales of mill sites; that he had examined the land of the petitioner in question with reference to forming an opinion as to its availability for a site for a mill

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for bleaching, dyeing, cleansing, and printing; that it was a very fine spot for a mill of that kind, on account of the supply of water which it had and the fact that the land of the petitioner was land lying below the head of the water, giving sufficient room for buildings, so that the water could flow through without pumping; that, from his experience, he knew what the value of a place of that kind is as a site for a mill for bleaching, dyeing, cleansing, and printing; that he had made no investigations in the neighborhood or elsewhere as to what the value of this site was for a mill of the kind described, or as to the value of this combination of land and water, but he had his own opinion about it from his own experience.

The court ruled: "If the witness states that he is familiar with the values of properties of this sort, of this kind, although for a particular purpose, I do not think his testimony incompetent. I think if he can say that he is familiar generally with the value of property of this kind, that he may testify." The witness was then asked: "Please state in your opinion what is the value of that combination there, that land and water there. What is the value, the fair market value of this combination of land here with the water power for the purposes of a printing business?" and answered, "I should think that with that amount of land, with that combination of land and water, that $50,000 would be a very low price for it." The defendant excepted to this question and answer.

The defendant is right in his contention that the damages must be measured by the injury to the fair market value of the plaintiff's land at the time of the taking; *Providence & Worcester Railroad* v. *Worcester*, 155 Mass. 35; *Moulton* v. *Newburyport Water Co.* 137 Mass. 163; and he is also right in his contention that where similar land is commonly bought and sold, the testimony of a witness, when found by the presiding justice to be competent to testify to its value, should ordinarily be limited on direct examination to giving a direct answer to the question, What is its fair market value, in view of all the purposes to which it is naturally adapted? *Manning* v. *Lowell*, 173 Mass. 100. The defendant is also right in his contention that ordinarily the proper way to qualify a witness as a witness to value of property is to show that he is familiar with sales of similar property and the prices paid therefor. *Lyman* v. *Boston*, 164 Mass. 99.

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it was an entry against the interest of the mortgagee, for while it did not purport to be a statement that the note was paid, still it did in substance cancel the note, and the mortgagee was thereby deprived of his right to collect his debt by proceeding thereon. At least, for the purpose of showing that he had lost this right, the memorandum was competent and was rightly admitted. Giving to it no other or further probative effect than this, and without reciting the evidence further in detail, we think the judge who tried the case was justified in finding that the second note was not regarded by the parties as a payment of the debt, but as a renewal of the old note for the balance unpaid, and that the payment of $100 was made by the mortgagor in 1874 upon the new note, and was part payment of the debt secured by the mortgage.

It follows that the mortgage was a valid outstanding mortgage at the time of the entry to foreclose. After the entry to foreclose the mortgagor and those claiming under him became tenants at sufferance of the mortgagee, and, in the absence of any evidence of an adverse holding, they are assumed to hold under him, and their possession is his, during the three years, until the completion of the foreclosure in August, 1891. *Ellis* v. *Drake*, 8 Allen, 161. *Porter* v. *Hubbard*, 134 Mass. 233.

The writ is dated in March, 1894, which is less than three years from the foreclosure, and since the defendant's estate was not ended until the completion of the foreclosure, the action was brought within the time prescribed by Pub. Sts. c. 175, § 10.

The second request was rightly refused because not applicable, since it appears by the bill of exceptions that two of these defendants were living upon the premises when the suit was commenced.

The third request was rightly refused because not applicable to the state of the case as finally submitted to the court.

Exceptions overruled.

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CHARLES F. HUNTING & others *vs.* GEORGE A. WARD.

Middlesex. January 12, 1900. — January 16, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Contract in Individual or Representative Capacity.

In an action for the services of a quartette in singing at a funeral, evidence of one of the plaintiffs, that the defendant called at his house and informed him of the death of a woman who was a member of the defendant's household, and wished the services of the quartette at her funeral at a time and place named, and that the defendant told the witness that the woman left money and the defendant would be the administrator of her estate, will warrant a finding that the defendant, who was appointed such administrator, reasonably was understood to contract in his private capacity.

CONTRACT, upon an account annexed, to recover twenty dollars for services in singing at a funeral. Trial in the Superior Court, before *Stevens*, J., who allowed a bill of exceptions, in substance as follows.

Gustave W. Ulmer, one of the plaintiffs, testified that the plaintiffs formed a male quartette called the Dalhousie Quartette; that on October 20, 1897, the defendant called at the witness' house and informed him of the death of one Trowbridge, and wished the services of the quartette at her funeral, which was to take place on October 21, at three o'clock P. M.; that the defendant asked the witness if he knew where he, the defendant, lived, and that witness said that he did; that the defendant told the witness that Mrs. Trowbridge had left money, and that the defendant would be the administrator of her estate; and that the plaintiffs were late at the funeral, owing to a mistake as to the house, not arriving until twelve minutes past three o'clock, but performed the services declared for.

The defendant testified that Mrs. Trowbridge had been for some years a member of his household; that on October 20 he saw the plaintiff Ulmer at his house and informed him of Mrs. Trowbridge's death, and that the services of the quartette were wished for at the funeral; that he asked Ulmer what price was charged by the quartette, and was told twenty dollars; that he

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told Ulmer that Mrs. Trowbridge had left some estate and he should probably be administrator, and also told Ulmer to send the bill to the estate of Mrs. Trowbridge (which last statement Ulmer denied), and further told Ulmer where the defendant lived; that the quartette were late in arriving at the house, not getting there until twenty-five minutes past three o'clock, and were all out of breath, as they had run to get to the house, and the first song was poorly sung; that on December 18, 1897, he sent to Ulmer a check for fifteen dollars for the services of the plaintiffs, signed by him personally, and indorsed on the margin of the face, "Adm'r of the estate of S. H. T.," inclosed in a letter stating that it "is all I think you are entitled to after we had to keep everything waiting so long for you"; that this check was returned to the defendant by Ulmer, who wrote demanding payment of twenty dollars; that the matter was placed in the hands of counsel, between whom and the defendant considerable correspondence passed; and that the defendant was duly appointed administrator of the estate of Mrs. Trowbridge.

The defendant asked the judge to rule that there was no contract between the plaintiffs and the defendant; but the judge declined so to rule.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

J. W. Keith, for the defendant.

W. S. Slocum & C. R. Darling, for the plaintiffs.

By the Court. The plaintiff's evidence warranted a finding that the defendant reasonably was understood to contract in his private capacity. Whether it warranted any other it is not necessary to consider. See *Durkin* v. *Langley*, 167 Mass. 577, 578.

Exceptions overruled.

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CHARLES M. THAYER, administrator, & another, *vs.* ELLEN F. PRESSEY, administratrix, & others.

Worcester. October 3, 1899. — January 25, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Trust — Patent — Assignment — United States Statute — "Legal Representatives" — Contract — Equity — Demurrer.

A., the owner of a patent, assigned it, together with all his right and title in and to any claims for past infringement thereof, to B., who prosecuted against certain agents of the United States a suit in his own name in the Circuit Court and obtained a decree on the merits ordering an accounting, no question having been raised as to the validity of his title under the assignment. Afterwards A. executed a contract with B. and C., an attorney, to share equally with them the sum realized from the prosecution of the claim after deducting all expenses incurred in such prosecution. A. died, and his daughter, who was appointed administratrix of his estate, contracted with B. and C. that if they would continue to prosecute the claim she would transfer the treasury warrant for the payment of the proceeds as soon as it should be issued, to joint trustees to collect the same and make distribution. Subsequently an act of Congress was enacted, authorizing the Secretary of the Treasury to pay to the "legal representatives" of A. a certain sum as "compensation in full for the use by the United States" of the patented invention, "as appears in the findings of law and of facts made by the United States Circuit Court" in the suit above named. B.'s administrator and C. brought a bill in equity against A.'s administratrix to enforce a trust in this money. *Held*, on demurrer, that the bill could be maintained.

In a bill in equity, by the assignee of a patent and of all right and title in and to any claims for past infringement thereof, to enforce a trust in a sum of money directed by a statute of the United States to be paid for such infringement, it is not necessary to annex a copy of the assignment nor to state the substance of its provisions in detail, but it is sufficient if the plaintiff states that he is the owner of an assignment in writing from the patentee of all his right, title, and interest in and to any and all claims for past infringement, and shows that the fund was appropriated by Congress as compensation for an infringement of the patent.

BILL IN EQUITY, filed in the Superior Court, by Charles M. Thayer, administrator of the estate of Sullivan Forehand, and Baxter E. Perry, against Ellen F. Pressey, as administratrix of the estate of John C. Howe and in her personal capacity, the Worcester National Bank, and George F. Blake, alleging the following facts.

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John C. Howe, late of Worcester, deceased, was the patentee named in certain letters patent of the United States, dated August 16, 1864, for improvements in cartridges.

On or about May 26, 1881, Sullivan Forehand and Henry C. Wadsworth, being then the owners by assignments in writing of all Howe's interest in the patent, and all his right, title, and interest in and to any and all claims for past infringement thereof, instituted in their own name proceedings in equity in the Circuit Court of the United States for the District of Connecticut, against certain officers and agents of the United States, who had purported to act in the premises as such, for infringement of the letters patent, and the suit was defended by the United States through their attorney for that district, and in the defence no objection was made to the complainants' claim as being held by them by assignment from Howe, but the case was tried on its merits, and the court held that the patent was valid and had been infringed, and ordered a decree in favor of the complainants for an accounting for the infringement charged.

After such decision, which was rendered on February 10, 1883, Forehand and Wadsworth presented to the Congress of the United States their memorial, setting forth the facts hereinbefore recited, and praying that just pecuniary compensation be made to them as assignees of Howe for all past infringement of the patent by the United States, or its officers or agents, and thereupon the claim of Forehand and Wadsworth was transmitted to the Court of Claims by the committee on claims of the Senate, on January 10, 1884, under the provisions of the U. S. St. of March 3, 1883. Under this reference the Court of Claims, upon a bill filed by Forehand and Wadsworth as such assignees, investigated all the facts material to the claim made by the memorial, including the validity of the patent, the infringement by the United States, and the proper pecuniary allowance for such infringement, covering the whole time from the grant of the patent, and reported to the committee on claims of the Senate on April 26, 1889, that a reasonable royalty for the United States to pay would be $66,907. In this litigation the defence was conducted by the United States through the Solicitor General, and lasted nearly five years; and in the successful prosecution of the claim before the courts and in Congress the plaintiff

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Perry lawfully expended more than $23,000, and Forehand lawfully expended more than $9,000, for which they have never been reimbursed.

On or about March 5, 1884, Wadsworth assigned to the defendant Blake all his right, title, and interest, legal and equitable, in and to the claim against the United States, as collateral security for the payment of Wadsworth's note, of even date therewith, for $5,000, which note has not been paid by Wadsworth.

On or about April 14, 1885, Forehand and Wadsworth gave to the plaintiff Perry a power of attorney, authorizing him to prosecute to final results in the Court of Claims and in Congress the claim against the United States before described. Wadsworth died while the claim was pending and before the passage of the act of Congress hereinafter referred to, and Forehand as surviving partner became the sole owner of the legal interest therein of Forehand and Wadsworth.

On or about November 8, 1889, Forehand and Perry entered into an agreement in writing with Howe, whereby each became entitled to one third of such sum as might thereafter be received from the United States pursuant to the prayer of the memorial, after deduction from such sum of the amount of certain expenses theretofore lawfully incurred by Forehand and Perry, in the litigation, and otherwise in establishing and furthering the claim, such expenses amounting to $25,500 and such further expenses, not exceeding $1,000, as might properly be incurred in the premises.

On August 18, 1892, Howe died intestate, leaving no widow, and leaving as his sole heir and next of kin a daughter, the defendant Pressey. On October 18, 1892, she was duly appointed the administratrix of the estate of Howe, and duly qualified as such.

In April, 1898, pursuant to the prayer of the memorial and to the decision and report of the Court of Claims, an act of Congress was passed, as follows:

"Be it enacted, . . . That the Secretary of the Treasury be and he is hereby authorized and directed to pay to the legal representatives of John C. Howe, deceased, sixty-six thousand nine hundred and seven dollars, out of any money in the Treasury not otherwise appropriated, the same being compensation

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in full for the use by the United States, to wit: in sixty-six million nine hundred and seven thousand three hundred and thirteen cup-anvil cartridges, of the invention secured to John C. Howe and his assigns by letters patent of the United States issued to him August sixteen, eighteen hundred and sixty-four, and number forty-three thousand eight hundred and fifty-one, during the entire term of said letters patent, as appears in the findings of law and of fact made by the United States circuit court for the district of Connecticut, in the case of Forehand and others versus Porter, reported in volume fifteen, of the Federal Reporter, at page two hundred and fifty-six, and as further appears in the findings of fact made by the Court of Claims, after full testimony and full hearing in Congressional case numbered one, entitled Forehand and others versus The United States, heard on reference of the matter to said Court of Claims by the Committee on Claims of the Senate under and pursuant to the Act of March three, eighteen hundred and eighty-three, commonly known as the Bowman Act, said findings of fact having been certified to the Committee on Claims of the Senate by said court on the twenty-sixth day of April, eighteen hundred and eighty-nine."

The act directed the payment to be made to the legal representatives of Howe, because he was the holder of the legal title to the fund and the plaintiff was but the holder of the beneficial or equitable estate therein.

The passage of the act was lawfully furthered and procured by Forehand and Perry through counsel employed by them for that purpose; and pending the proceedings thereon in Congress, and prior to the passage thereof, it was agreed by Pressey by a writing, dated June 15, 1894, which referred to the contract of November 8, 1889, that if Forehand and Perry would continue to prosecute the claim against the United States she would transfer the treasury warrant for the payment of the proceeds as soon as it should be issued, to joint trustees to collect the same and make distribution according to this agreement; and the payment was received by the defendant Pressey upon those terms; and it was then also agreed between them that the only sum to be deducted from the fund for expenses mentioned in the contract referred to should be the sum of $25,500.

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Shortly after the passage of the act of Congress, the amount specified therein was paid by the United States to the defendant Pressey, as such administratrix, as and for the compensation theretofore prayed for by Forehand and Wadsworth.

The defendant Pressey, upon receiving the amount of such payment, deposited the same in her name with the defendant bank, and the same still remains there to her credit, except that by order of court there has been paid out to her the sum of $650, and to counsel for professional services rendered by him in obtaining the passage of the act the sum of $10,102.

The fund is in the hands of the defendant Pressey charged with a trust in favor of the plaintiffs to the extent of $25,500 thereof and two thirds of the balance, namely, to the extent of $53,106, less the payments by order of court, leaving $42,352.

After the deposit with the defendant bank, Forehand died intestate, and the plaintiff Thayer was duly appointed and qualified as administrator of his estate.

The amount of $42,352 belongs to the plaintiffs in the following proportions: To the plaintiff Thayer, administrator, the amount of about $15,070, and to the plaintiff Perry about $27,252.66, the difference being due to the fact of the difference in the amounts of payments of the expenses by Forehand and Perry respectively, and the interest of Perry in the fund is further subject to a trust in favor of Blake to pay therefrom to him, for money lent to Wadsworth, the sum of $5,000 with interest at ten per cent from March 5, 1884.

The defendant Pressey contends that the whole amount of the fund is assets of the estate of Howe, and denies that either Thayer, administrator, or Perry or any person claiming under either of them has title to any part thereof.

Upon the receipt of the fund by the defendant, Perry and Forehand duly demanded of her payment of their share thereof, but she refused to pay the same or any part thereof, except the payments by order of court.

The prayer of the bill was that it might be decreed that the defendant Pressey holds in trust for the plaintiffs so much of the fund as amounts to $42,352.66, in the proportions hereinbefore set forth; that she be ordered to pay the same to the plaintiffs respectively, in such proportions, with interest thereon

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from the date of the receipt of the fund by her; and for an injunction.

The defendant Pressey demurred to the bill, upon the grounds, among others, that no copy of the assignment was set forth; that the proceedings in the Circuit Court and Court of Claims were, so far as the defendant was concerned, *res inter alios*, and neither she nor her intestate was a party to or bound or affected by such proceedings; and the same was true as to the memorial to Congress and the action taken thereon; that as to the claim to reimbursement for expenditures made in the litigation, neither the defendant nor her intestate was a party to such litigation or expenditures or bound or affected thereby; that the act of Congress directs that the fund be paid to the legal representatives of Howe, and they were exclusively entitled to the fund; that the assignment, the contract of November 8, 1889, and the agreement made by the defendant on June 15, 1894, were all void by the provisions of the statutes of the United States; and that the defendant had no authority as administratrix to make such an agreement.

Hearing upon the bill and demurrer, before *Fessenden*, J., who, at the request of the parties, reserved the case for the consideration of this court. If the demurrer was sustained without amendment allowed, the bill was to be dismissed; otherwise, such order was to be made as justice and equity might require.

H. Parker, (*C. C. Milton & C. Bullock* with him,) for the defendant Pressey.

C. Browne & C. M. Thayer, (*G. S. Taft* with them,) for the plaintiffs.

KNOWLTON, J. This case is reserved for our consideration on the bill and a demurrer which goes to the merits of the whole case. Ellen F. Pressey, hereinafter called the defendant, as she alone defends on the issues now raised, is the daughter and sole heir of John C. Howe, late of Worcester, deceased, and is the duly appointed administratrix of his estate. As his legal representative she was paid about $67,000 by the treasurer of the United States under an act of Congress passed in April, 1898, which is as follows: "Be it enacted, . . . That the Secretary of the Treasury be and he is hereby authorized and directed to pay to the legal representatives of John C. Howe, deceased, sixty-six

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thousand nine hundred and seven dollars out of any money in the Treasury not otherwise appropriated, the same being compensation in full for the use by the United States, to wit: in sixty-six million nine hundred and seven thousand three hundred and thirteen cup-anvil cartridges, of the invention secured to John C. Howe and his assigns by letters patent of the United States issued to him August sixteen, eighteen hundred and sixty-four, and numbered forty-three thousand eight hundred and fifty-one, during the entire term of said letters patent, as appears in the findings of law and of fact made by the United States circuit court for the district of Connecticut in the case of Forehand and others versus Porter, reported in volume fifteen of the Federal Reporter at page two hundred and fifty-six, and as further appears in the findings of fact made by the Court of Claims, after full testimony and full hearing in Congressional case numbered one, entitled Forehand and others versus The United States, heard on reference of the matter to said Court of Claims by the Committee on Claims of the Senate, under and pursuant to the Act of March three, eighteen hundred and eighty-three, commonly known as the Bowman Act, said findings of fact having been certified to the Committee on Claims of the Senate by said court on the twenty-sixth day of April, eighteen hundred and eighty-nine." This money, less $10,752 paid by order of the court on account of expenses, is on deposit to her credit in the defendant bank, and the plaintiffs contend that, by virtue of an assignment and certain contracts, it is charged with a trust in their favor for the sum of $25,500 expended in preliminary litigation and in prosecuting the claim before Congress, and also for two thirds of the balance as the share to which they are entitled under the assignment and contracts, less the amount of said payments made by order of the court, making the amount of their present claim $42,352. The last of these contracts was executed on June 15, 1894, by the defendant herself. Her father died on August 13, 1892, and she was appointed administratrix on October 18, 1892. The assignment and contracts set out in the bill, with the accompanying averments, present a case of strong equities in favor of the plaintiffs, unless the existence of the statutes and decisions on which the defendant relies so affects their conduct as to pre-

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vent their recovery. The defendant contends that the assignment and contracts under which the plaintiffs claim are void under the Revised Statutes of the United States, § 3477, which is as follows: "All transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same." This statute is a re-enactment from the U. S. St. of February 26, 1853, which is entitled "An Act to prevent frauds upon the treasury of the United States," and which has frequently been considered by the Supreme Court of the United States. 10 U. S. Sts. at Large, c. 81. In *Spofford* v. *Kirk*, 97 U. S. 484, it was held that a duly accepted order given by the holder of a claim against the United States in favor of a third person, upon one whom he had employed to collect the claim, and afterwards transferred to a purchaser for value, who took it in good faith, could not be enforced against the drawer upon the fund. Mr. Justice Strong, in giving the opinion, said: "It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." Notwithstanding this strong general lan-

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guage, the court has since recognized exceptions to its universal inclusiveness. In *Goodman* v. *Niblack*, 102 U. S. 556, 559, 560, it is said that the mischiefs intended to be remedied by the statutes are, "First, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction. Second, that by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest." The court then says that "both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the government, and not the parties to the assignment." It was decided in this case that a voluntary assignment of a claim against the United States with other property by an insolvent debtor, with preferences, was valid, notwithstanding the statute. It had previously been held in *Erwin* v. *United States*, 97 U. S. 392, that the statute did not apply to assignments by operation of law, and that such claims passed by an assignment in bankruptcy. See *Price* v. *Forrest*, 173 U. S. 410.

The doctrine that "the object of the statute was to protect the government and not the claimant, and to prevent frauds upon the treasury" has been strongly stated in numerous other cases. See *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494; *Bailey* v. *United States*, 109 U. S. 432; *Hobbs* v. *McLean*, 117 U. S. 567. Accordingly, while the government may always disregard an assignment of a claim against it, there is a class of cases in which claims against the United States have been included in assignments and transfers and have passed from the assignor to the assignee with full effect between the parties, as incident to the general subject of the contract. *Hobbs* v. *McLean*, 117 U. S. 567, was a case where one having a contract with the United States to furnish army supplies, made an agreement with others whereby they were to become partners with him and have a share in the money to be received from the United States. It was held that such a transfer of an interest in the claim was valid

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as between the parties and was not within the statute. In *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494, the United States government was a lessee of real estate and liable to pay rent, and on an assignment of the lease and the rent under it, it was held that there was nothing in this statute which invalidated the transaction as between the parties, the government having chosen to recognize the assignment. In *Barrow* v. *Milliken*, 74 Fed. Rep. 612, it was decided by the Circuit Court of Appeals, while considering this statute, that a sugar planter might mortgage and pledge his crop and his claim for a bounty to be received from the United States, in such a way as to be effectual against himself and others claiming under him, although the claim had not been presented and allowed. The plaintiff in *Jernegan* v. *Osborn*, 155 Mass. 207, was the owner of one sixteenth part of the ship Europa, whose owners sustained losses by reason of services rendered by the ship in assisting in the rescue of nine hundred seamen in the Arctic seas. Afterwards he sold his interest in the ship to the managing owner, and still later he sold to the same person all his interest in the voyage in which the losses occurred, including "any claims by the owners of said Europa against the United States government." Afterwards, by an act of Congress, an award was made to the owners of the vessel in full compensation for these losses, and it was held that the plaintiff's share in the award passed to the defendant under the assignment, and that the statute did not render the assignment void as between the parties. In all these cases there was something more than a naked assignment of a claim for the purpose of collection and enjoyment, and in each of them the claim, as a part of the transaction, or as an incident, was of substantial importance. In only one case, so far as we know, where the assignment of the claim was an incident to a larger transaction, has it been said that the assignment was invalid as between the parties. In that case (*St. Paul & Duluth Railroad* v. *United States*, 112 U. S. 733) another ground for the decision is stated which is conclusive, namely, that there is no description in the conveyance sufficient to include the claim, and it is then said that if there were, the assignment of it would be invalid under the Revised Statutes of the United States, § 3477. The question whether it should make a difference that the

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assignment was a mere incident to the conveyance of the principal subject to which the conveyance related, apparently was not considered. In one of the latest cases in which the statute has been considered, the present Chief Justice of the United States speaks of "the intent of Congress that an assignment of naked claims against the government for the purpose of suit, or in view of litigation or otherwise, should not be countenanced." In the next sentence he treats the statute as analogous to the rule against maintenance and champerty. *Hager* v. *Swayne*, 149 U. S. 242, 247. In *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314, 336, Mr. Justice Grier says of the statute, "This act annuls all champertous contracts with agents of private claims."

Another exception to the broadest application of this statute has been established. It has repeatedly been held that if the government has recognized the validity of an assignment which otherwise would be void under the act, the assignor is bound by the recognition which in terms he authorized. *Bailey* v. *United States*, 109 U. S. 432. *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494. *Goodman* v. *Niblack*, 102 U. S. 556. The late case of *Ball* v. *Halsell*, 161 U. S. 72, does not change the doctrine of any of the cases above cited. The decision rests upon a different statute from that in question, namely, the U. S. St. of March 3, 1891, which applied directly to the claim then before the court, and was held to be constitutional. The reference to the former statute was principally to show how the legislation had grown up, and what were the inducements to the enactment of the later act.

In the present case Forehand, the plaintiff Thayer's intestate, and his partner Wadsworth, who has since deceased, took from Howe, the defendant's intestate, an assignment of his patent, together with all his rights and claims for past infringements of it. The claim against the United States for an infringement was one in which they would have an interest as purchasers of the patent. The establishment of the claim that the manufacture of cartridges by the United States was an infringement, might have an important effect upon the value of the patent in reference to existing conditions, as well as to a possible renewal of it. They prosecuted a suit in their own names in the Circuit Court of the United States, and obtained a

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decree upon the merits ordering an accounting, no question having been raised by the representatives of the United States as to the validity of their title under the assignment. So far as appears upon the bill, their title to the claim against the United States seems to be similar to those in the cases above cited, where there was not an assignment of a naked claim for the purpose of collection, but a conveyance of substantive property with which the claim was connected and to which it was in a sense incident. So, too, their claim was similar to others above referred to, in having been recognized by the government. Throughout the litigation in the Circuit Court of the United States the government, by its representatives, assumed that their title was good, and contested the claim only on the question whether the manufacture was an infringement of the patent. Moreover, the act of Congress first above quoted and the averments of the bill show that the money was given upon proceedings pending before Congress in the names of the assignees, and purporting to be for their benefit, and that the appropriation was in compensation for the use shown in the case in the Circuit Court of the United States prosecuted by the assignees. The findings of law and of facts in two cases prosecuted in the names of the assignees are adopted into the statute and made the foundation of the appropriation. The term "legal representatives," used in the act, ordinarily means executors or administrators; but it is a broad expression which may refer to heirs, or to others who represent rights by succession under a conveyance. See *Lodge* v. *Weld*, 139 Mass. 499, 504. The power of sale in a common form of mortgage in this Commonwealth is to "the mortgagee and his legal representatives," which certainly gives the authority to assignees of the mortgage as well as to executors or administrators. It is to be noticed in the present case that when the statute was passed, the defendant had for a long time been the sole administratrix of John C. Howe's estate, and this must be presumed to have been known when the bill was enacted. In view of the nature of the assignment from Howe, as stated in the bill, and in view of the recognition of the assignees by the representatives of the government, we are of opinion that the statute is not to be interpreted as giving the money to the defendant to be wholly

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distributed as a part of her father's estate, but to be disposed of according to the interests then existing under the assignment of the patent and the claims for an infringement of it, and under the contract which Howe had subsequently made in reference thereto. There is the more reason for so holding, inasmuch as the defendant, after her father's death, recognized the assignment and this contract in the most formal way, before the act of Congress was passed, and solemnly contracted that if the plaintiffs would continue to prosecute the claim she would transfer the treasury warrant for the payment of the proceeds as soon as it should be issued, to joint trustees, to collect the same and make distribution. Neither this contract which she made, nor the last contract of her father which she adopted, purported to be an assignment. He had previously made as effectual an assignment as he was capable of making.

It is contended in her behalf that she had no authority as administratrix to make such a contract. There is strong ground for an argument that the relation of her father's estate to the claim under the assignment and the proceedings in court and before Congress and under the contract of November 8, 1889, recognizing the title of the assignees, was such as to make it proper for her to contract as she did. Whether as administratrix she could bind the estate in this way or not, so far as she undertook to bind herself and her interest as sole heir at law, it would be most inequitable to permit her to repudiate her agreement.

All that we have said is applicable to the claim of Thayer, administrator of Forehand, who with Wadsworth was one of the two original assignees. The bill avers that since the death of Wadsworth Forehand has been the owner of his legal interest as surviving partner, and that Thayer as administrator represents the entire claim, except as it is affected by the assignment from Wadsworth to Blake as collateral security for the payment of a note for $5,000, and by the agreement with the plaintiff Perry, and the subsequent agreements with Howe and with the defendant. That the equitable claims under the original assignment to Forehand and Wadsworth should be held to be good under the act of Congress we feel very certain. In regard to the claim of Perry we have more doubt. Perhaps we may presume that Congress, when it

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directed payment to the legal representatives of Howe and referred to the claims of the assignees, was aware of the facts in regard to the title, and that the act was passed in reference to Howe's contract of November 8, 1889, and the subsequent contract of the defendant. Congress was legislating in regard to a title held by legal representatives, and it is fair to assume that it thoroughly understood the subject of the legislation. In that view, whether the original contract with Perry was valid or not, inasmuch as these later contracts had reference to a claim already assigned by Howe to Forehand and Wadsworth under an assignment which appears to have been proper, and to have been recognized by the government, perhaps we properly may infer an intent on the part of Congress that the money should be held and distributed by the defendant under these contracts. Seemingly, by agreement of the plaintiffs, Perry is joined as a plaintiff with the administrator of Forehand, whose title we have no hesitation in upholding, and there is no demurrer to his claim, except that which is included in the demurrer to the whole title of the plaintiffs. Apparently it will make no difference to the defendant whether the suit proceeds in the names of both plaintiffs or in the name of Thayer, administrator, alone. This part of the case has not been argued by the defendant, and we do not know that she cares to object to Perry's claim, if the only effect of the objection would be to leave his share in the hands of Thayer. These last contracts seem to have been advantageous to Howe's estate, and as their validity is assumed by all the other parties, and as there is no demurrer applying particularly to Perry's title, we are not inclined to sustain the defendant's demurrer on account of Perry's claim under them, or on account of the assignment to Blake.

The defendant demurs to the bill because no copy of the original assignments is annexed and no sufficient statement of their contents is set out. We are of opinion that the plaintiffs were not bound to annex a copy of the assignments nor to state the substance of their provisions in detail. They were bound to state all the substantive facts on which their right to relief depends, among which is their title to a share in the fund. This they sufficiently set forth when they state that they are the owners by assignments in writing from the patentee of all

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his right, title, and interest in and to any and all claims for past infringement, and show that the fund was appropriated by Congress as compensation for an infringement of the patent. See Story, Eq. Pl. §§ 257 *et seq.*; 6 Encyc. of Pl. & Pr. 287, and notes. *Demurrer overruled.*

JOHN T. HEARD & another, trustees, & another, *vs.* CHARLES H. TRULL & others.

Middlesex. March 24, 1899. — January 26, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Will — Termination of Trust — Statute — Power of Trustees — Practice.

Where an estate is devised to trustees to pay the income to A. for life, and on his death it is directed that the trust estate shall be divided into two equal parts, one of which shall go to B. and his heirs in fee, and the other part shall be divided among the testator's heirs at law, the estate, at the death of A., vests in B. and the heirs of the testator, in equal moieties, as tenants in common, and the provisions of the St. of 1898, c. 65, do not apply.

Where there is a right of appeal from the Probate Court to this court, the matter in controversy should be judicially heard and determined in the court below.

Where the trustees under a will have power to convert personal estate into money, a petition for the protection of the trustees may be maintained under St. 1898, c. 65, which provides for the distribution of trust estates.

PETITION to the Probate Court under St. 1898, c. 65, entitled "An Act relative to the distribution of trust estates." Hearing before *Hammond*, J., who entered a decree, and an appeal was had to the full court. The facts appear in the opinion.

G. A. Sanderson, for the appellants.

F. N. Wier, for the appellees.

LATHROP, J. The will of John W. Trull has been before this court in three cases. *Sohier* v. *Eldredge*, 103 Mass. 345. *Heard* v. *Read*, 169 Mass. 216. *Heard* v. *Read*, 171 Mass. 374.* The first case has no bearing upon the questions before us. The second case decided, among other points, that the testator had in mind his heirs at law living at the time of the decease of his

* The material portions of the will may be found in *Heard* v. *Read*, 171 Mass. 374, 375.

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daughter, when the one half was to be divided among his heirs at law; and that the words "as though I died intestate" meant "as though I then died intestate." In the third case it was decided that the trustees, after the death of Mrs. Eldredge, had no power under the will to sell the real estate, and divide the proceeds, one half to John T. Heard and one half among those who would have been the heirs of the testator, had he died intestate at the time Mrs. Eldredge died. The court left undetermined the question whether the trustees had any power to divide the real estate. The court also left undetermined two other questions: first, whether, if the will did not give the trustees the power to sell, the court could give them that power on the facts appearing in the case; and, secondly, whether the persons interested had a remedy in the Probate Court under the St. of 1898, c. 65.

The present application is a petition to the Probate Court under the statute last mentioned, by the trustees under the will of John W. Trull and by one of the nieces of the testator. The prayer is that the court, "after such notice as it may direct, may order the said estate, both real and personal, so given to said heirs, to be converted into cash and distribution thereof to be made to such individuals as according to such will seem to be entitled thereto; and for that purpose that your petitioners, the said trustees, may make sale and conveyance and transfer at private sale or at public auction at their election of both said real and personal estate."

On the day appointed for a hearing in the Probate Court the respondents appeared, but the petitioners did not appear, and the court dismissed the petition on this ground, as appears by the decree. The trustees only appealed from the decree to this court. The case was heard by a single justice of this court, who entered a decree directing the trustees to sell the estate both real and personal of John W. Trull, and pay the net proceeds to the heirs of John W. Trull, according to the statutes relating to the descent of real estate in the case of persons dying intestate on July 4, 1895, the date of the death of Mrs. Eldredge; and the case was ordered to be remitted to the Probate Court to ascertain the persons so entitled to receive the proceeds, and for an order of distribution, and for such further proceedings as might

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be necessary in the premises. From this decree the five persons who would constitute the heirs at law of John W. Trull, determined as of the date of Mrs. Eldredge's death, according to the statutes relating to the descent of real estate in force at the date of the death of John W. Trull, namely, April 12, 1867, appealed to the full court.

In the first place we deem it proper to say that the petitioners should have appeared and presented their case to the Probate Court, and that this court should not be converted "from an appellate tribunal, as contemplated by the statutes, into a court of original jurisdiction." *Parker* v. *Parker*, 118 Mass. 110.

Passing from this, the principal question in the case is whether the St. of 1898, c. 65, has any application to the case before us. Section 1 of this chapter is as follows: "Whenever by the provisions of a written instrument a trust estate is to be distributed in whole or in part among the heirs or next of kin of any person or persons, or to a class of persons, the probate court, on the application of any person interested, after such notice as it may direct, may order the said estate, both real and personal, or either, to be converted into cash, and distribution thereof to be made to such individual or individuals as, according to such instrument, seem to be entitled thereto, and such order of distribution shall protect the trustee obeying the same as fully as an order of distribution in the case of an intestate estate."

So far as the personal estate is concerned, while it is true, as was said in *Heard* v. *Read*, 169 Mass. 216, 225, that the trustees have power to convert it into money, we are of opinion that the petition may be maintained under the St. of 1898, c. 65, for the protection of the trustees.

So far as the real estate is concerned, the question is, as stated in *Heard* v. *Read*, 171 Mass. 374, "Whether the trustees still hold the legal estate in the real property, or it is vested in John T. Heard and the heirs of the testator." This question was not decided in that case; though it was discussed, and speaking of the language of the will the court said: "This language does not indicate that the testator intended that the real estate after Mrs. Eldredge's death should be converted into money by the trustees, and the money paid to the persons entitled to it. It rather indicates that the trust premises, so far as they consisted

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of real estate, should specifically go in fee simple either to the issue of Mrs. Eldredge or to John T. Heard and the testator's heirs at law, to be divided as directed by the will." Now the will directs that, in the contingency which has occurred, namely, the death of the daughter without issue surviving her, "the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. Heard and his heirs in fee forever, and the other part shall be divided among my heirs at law, as though I died intestate."

It does not seem to us that the testator intended that the trustees should have any power after the death of Mrs. Eldredge to make a partition of the estate, as no such power is specifically given to them, nor is it fairly to be implied. The intent of the testator was as to the real estate that John T. Heard should have one half, and his heirs the other half. This would make them tenants in common; and their shares vested at the death of Mrs. Eldredge. See *Simonds* v. *Simonds*, 112 Mass. 157, 165; *Belote* v. *White*, 2 Head, 703; *Farrow* v. *Farrow*, 12 S. C. 168, 172. In each of these cases a provision that an estate in the hands of trustees should be divided on a certain event happening, was held not to continue the trust for the purposes of division.

It follows that the decree of the single justice must be modified so far as it relates to the real estate of the testator; and that in other respects it is affirmed. *Decree accordingly.*

WILLIAM H. CARSON *vs.* SEWERAGE COMMISSIONERS OF BROCKTON.

Suffolk. November 23, 1899. — January 30, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Sewer — Statute — Ordinance — Constitutional Law.

The St. 1892, c. 245, providing that the city council of any city except Boston, or a town, with sewers laid out under Pub. Sts. c. 50, §§ 1–8, or with a system of sewerage under § 7, may establish just and equitable annual charges or rents for the use of such sewers, to be paid by every one who enters his sewer into the

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common sewer, and an ordinance of a city thereunder, charging for "unmetered" water service eight dollars, and for "metered" water service thirty cents per thousand gallons of sewage delivered to the sewer, but no charge to be less than eight dollars subject to certain possible discounts, are constitutional.

PETITION for a writ of certiorari to quash an assessment upon the petitioner's property in Brockton for the use of a common sewer. The respondents demurred to the petition. Hearing upon the petition and demurrer, before *Barker*, J., who, at the request of the parties, reserved the case for the consideration of the full court; such order to be made as law and justice might require. The facts appear in the opinion.

F. M. Bixby, for the respondents.

W. H. Carson, pro se.

HOLMES, C. J. This is a petition for a writ of certiorari for the purpose of quashing the assessment of an annual charge for the use of a common sewer. The assessment was authorized by St. 1892, c. 245, § 1, and by an ordinance in pursuance of that section. It is objected that both statute and ordinance are unconstitutional.

By the statute the city council of any city except Boston, or a town, with sewers laid out under Pub. Sts. c. 50, §§ 1–3, or with a system of sewerage under § 7, may establish just and equitable annual charges or rents for the use of such sewers, to be paid by every one who enters his sewer into the common sewer. The ordinance charges for "unmetered" water service eight dollars, and for "metered" water service thirty cents per thousand gallons of sewage delivered to the sewer, but no charge to be less than eight dollars subject to certain possible discounts. It is argued that the statute is subject to the objections which prevailed in *Sears* v. *Street Commissioners*, 173 Mass. 350, that the charge is a tax which properly should be borne by the public generally, and that there are no provisions for a hearing.

We are of opinion that the petitioner received a special benefit for which he might be charged, and that this case is free from the elements which in *Sears* v. *Street Commissioners* led to the conclusion that the petitioner was assessed without regard to the benefits received by him. No one denies that it was a special benefit to the petitioner to have a sewer built in front of his land. That benefit was the probability that the sewer

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would be available for use in the future. But the city, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it.

The charge allowed by the act is a charge for using the sewer, a benefit distinct from that originally conferred by building it. By the statute the charge must be a "just and equitable" charge. These words have been held insufficient to save the constitutionality of a statute in *State* v. *Commissioners of Streets & Sewers*, 9 Vroom, 190, and in *Barnes* v. *Dyer*, 56 Vt. 469. But the facts of those cases were too different to make them conclusive. Here the words are applied solely to those who actually use the sewer. Therefore the benefit to the parties assessed is established. The assessment in order to be equitable must be proportional to the benefit and not in excess of it. The words in this connection sufficiently express an intent to confine the charge within constitutional limits. They are so construed by the ordinance. For by the ordinance the charge is in proportion to the extent of the use, which is a reasonable way of estimating the extent of the benefit received. See *Parker* v. *Boston*, 1 Allen, 361, 367. There is no charge unless the sewer is used. The charge to the plaintiff was $42.53, and therefore under the terms of the ordinance which we have stated must have been determined by meter.

It is said that there is no provision for a hearing. But under the ordinance the only questions are whether the petitioner's sewer enters the common sewer, and what amount of sewage is shown by the meter readings to have been delivered to the sewer. If the petitioner wished to be heard on either of these facts, no doubt he could resort to the courts. On the rate per thousand gallons fixed by the ordinance he was not entitled to be heard. So far as appears, if he is dissatisfied with the rate he is not obliged to use the sewer. But if he were compelled by law to use it and to pay as now for the use, (St. 1890, c. 132,) and recognizing as we must the possibility that, in spite of the

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meaning which we attribute to the statute, the rate fixed by the ordinance might be in excess of the benefit received, still in our opinion the act and ordinance would be valid, notwithstanding that mere possibility in the absence of any allegation that the rate fixed did exceed, in fact, the benefit received. In cases of this sort the petitioner has no right of appeal to a jury. *Howe* v. *Cambridge*, 114 Mass. 388. The final decision must be somewhere, and may as well be left to the city council as to any one. *New London Northern Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386, 387, 388. If it is left to them they are not obliged to hear the several parties who may be affected before fixing a general rate. Clearly the rate might have been fixed by the Legislature without a hearing. *Parsons* v. *District of Columbia*, 170 U. S. 45. And whatever differences there may be between the Legislature of the State and inferior although legislative bodies in cases where particular property is to be valued, still when a uniform and self-adjusting rate is adopted under which no question as to proportion can arise, or any other question except the general one whether the rate is high, we are of opinion that the Legislature has power to authorize a city council to determine that question as it has done here. *United States* v. *New Orleans*, 98 U. S. 381. *Railroad Commission cases*, 116 U. S. 307. *Spencer* v. *Merchant*, 125 U. S. 345, 356. *Chicago, Milwaukee, & St. Paul Railway* v. *Minnesota*, 134 U. S. 418, 459. *Reagan* v. *Farmers' Loan & Trust Co.* 154 U. S. 362, 394. See further *Leominster* v. *Conant*, 139 Mass. 384.

If under the pretence of fixing an equitable rate the ordinance should do what amounted to the taking or destruction of property, very possibly that might afford a ground for judicial interference as in other cases where the Legislature fixes rates. *Smyth* v. *Ames*, 169 U. S. 466. *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649. *Chicago, Milwaukee, & St. Paul Railway* v. *Minnesota*, 134 U. S. 418. See *Parker* v. *Boston*, 1 Allen, 361.

Petition denied.

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NATICK GAS LIGHT COMPANY *vs.* INHABITANTS OF NATICK. SAME *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Middlesex. November 18, 1898. — February 27, 1900.

Present: KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Abolition of Grade Crossings — Alteration of Grade — Discontinuance of Way — Taking of Land — Statute — Damages.

A gas company cannot maintain a petition under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, relating to the abolition of grade crossings, against a town to recover the expense incurred by the petitioner in taking up and relaying its main pipe in a street, the grade of which has been altered by proceedings under those statutes.

Under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, relating to the abolition of grade crossings, and providing for the recovery of damages sustained by an abutter on a way by the discontinuance of such way "to the same extent as damages are now recoverable by law by abutters on ways discontinued by towns," a gas company, which owns land abutting on a street discontinued by proceedings under those statutes, cannot recover against the town, if it is not shown that the loss of the right to keep its main pipe in the street diminished the value of its land; but it may recover against the railroad corporation the value of so much of the pipe as lay in its land which was taken by the proceedings in question.

TWO PETITIONS, under St. 1890, c. 428, as amended by St. 1891, c. 123, to recover damages alleged to have been sustained by the petitioner in its property by the alteration of the grade of a public way, the discontinuance of a way, and the taking of land, in connection with the abolition of certain grade crossings in the respondent town. The cases were tried together in the Superior Court, before *Fessenden*, J., who directed the jury to return a verdict for the respondent in each case; and, at the request of the parties, reported the cases for the determination of this court. If such direction was right, judgment was to be entered for the respondent in each case; otherwise the verdict in each case was to be set aside and a new trial had. The facts appear in the opinion.

The case was argued at the bar in November, 1898, and afterwards was submitted on briefs to all the justices except *Holmes*, C. J.

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R. P. Clapp, for the petitioner.

P. H. Cooney, for the respondents.

HAMMOND, J. By reason of the abolition by proceedings under St. 1890, c. 428, of certain grade crossings of the streets and railroad in Natick, the petitioner was deprived of certain land, and was put to expense in altering some of its mains legally existing in the public streets. The land taken consisted of a parcel not included in any street, and an adjoining parcel included in the location of Harris Street. This latter street, upon which the land of the petitioner abutted and into which from its gas works its chief distributing main ran, was discontinued, and the land formerly included within its location was taken for the new location of the railroad, which was built at a grade much below the former grade of the street. This compelled the petitioner, at an expense of $430, to substitute for the Harris Street main a new one in another locality. Of this loss $40 was in respect of so much of the main as lay in the petitioner's own land in Harris Street. By the raising of the grade of Main Street, two blocks distant from this locality, the petitioner was obliged, at an expense of $1,085.51, to take up and relay its main in that street.

The questions raised by the report are whether the company can recover by petitions under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, its loss of $1,085.51 on account of the Main Street main, and its loss of $430 on account of its Harris Street main, and if it cannot recover the whole of the latter loss, whether it can recover the $40, which represents its loss in respect of so much of its Harris Street main as lay in its own land in Harris Street.

1. As to the expense with respect to the Main Street pipe. The provision for the assessment of damages in the case of a change of grade of the highway under this statute is found in § 5, which, so far as material to this question, is as follows: "All damages sustained by any person in his property by the taking of land for, or by the alterations of the grade of, a public way," in case the parties cannot agree, may be determined by a jury "in the same manner and under like rules of law as damages may be determined when occasioned by the taking of land for the locating and laying out of . . . public ways." Whether

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the phrase "in the same manner," etc., is to be considered as referring to the mode of ascertaining the damage already given in the preceding part of the statute, or as descriptive of the kind of injury for which damages may be assessed, (see *Rand* v. *Boston*, 164 Mass. 354; *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180,) it is certain that, so far as material to the question now before us, the language of the whole section is no broader than the provisions of Pub. Sts. c. 49, §§ 14, 16; for by the former of these two sections damage "sustained by any persons in their property" by change of grade of the street is given, and by the latter section it is provided that in estimating such damage "regard shall be had to all the damages done to the party whether by taking his property or injuring it in any manner."

It becomes necessary to inquire into the nature of the loss sustained by the company. The pipe was personal property and the title to it did not change. *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75. By reason of the change of grade it was no longer useful as originally placed, but it was still the property of the petitioner. The petitioner, as against the land owner, had in itself no easement. Its only right was as stated by Bigelow, C. J., in *Commonwealth* v. *Lowell Gas Light Co.*, *ubi supra*, "to use land, the whole beneficial use of which had been previously taken from the owner and appropriated for a public use, in such manner that no nuisance shall be committed, no disturbance be created to the easement of the public, and no injury done to" other parties. It is permitted to share in the general use for which the public have paid. But whether this right, although not rising to the dignity of an easement, be a valuable one, the loss of which is a damage to the petitioner within the doctrine laid down in *Marsden* v. *Cambridge*, 114 Mass. 490, it must, nevertheless, be regarded as subordinate to the general purpose for which the land was originally taken, to wit, public travel, and must yield to the necessities of that purpose.

The permission to lay down pipes in the public ways, whether or not so long as the way remains public and the pipe does not interfere with the other general public uses it be revocable, must be held to have been granted originally upon the condition that the pipes, neither at the time of the laying nor thereafter, shall interfere with the public travel upon the way as then existing or

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as it may thereafter be changed to meet the reasonable exigencies of such travel. To hold otherwise, and to say that whenever under the statute permission a gas pipe is laid in a public way the pipe cannot be disturbed, even to make such changes as are required by public travel, except under the right of eminent domain, is to make what is a merely subordinate use paramount to the great important use for which the land is taken. Such a construction seems to us unreasonable.

Under the true construction it is plain that no legal right to property of the petitioner was invaded; and even if it be claimed that the language of the statute is broad enough to give damages in some cases for injuries suffered not as the consequence of the loss, or invasion of a legal right, still we cannot apply any such rule here. In removing its pipes the petitioner was simply complying with an implied condition annexed to the permission under which its pipes were laid. It had agreed in law that its pipes should lie in the way at its peril, so far as respects the exigencies of public travel. It was, therefore, not entitled to recover for the expense as to the pipe in Main Street.

2. As to the loss of $430 in respect of the Harris Street main. There is an additional reason why this loss cannot be recovered. It was due neither to a taking of land for, nor to the alteration of the grade of, a public way, and the town could be held only on the ground that the damage was occasioned by the discontinuance of the street. While the statute as first enacted contemplated that by proceedings under it public ways would be discontinued, it did not expressly mention the subject of damages by such a discontinuance. See St. 1890, c. 428, §§ 4, 5. In the year 1891, an amendment was enacted "so as to provide for the assessment of damages in case of the discontinuance of a public way." This amendment does not say that all damages sustained by any person in his property by the discontinuance of a public way in effecting the abolition of a grade crossing shall be paid for. The amendment was by inserting certain words in St. 1890, c. 428, § 5, and we quote the beginning of the section as amended. "Section 5. All damages sustained by any person in his property by the taking of land for, or by the alterations of the grade of, a public way, or by an abutter thereon, for the discontinuance of such public way, to the same extent as damages

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are now recoverable by law by abutters on ways discontinued by towns, shall primarily be paid by the city or town." The new obligation is only to abutters on the discontinued way, and for such damages only as are recoverable by law by abutters on ways discontinued by towns. The gas light company was, in the language of the statute, an abutter on the discontinued Harris Street, and the further question is whether its loss with respect to the Harris Street main was a damage recoverable by law by an abutter on a way discontinued by a town.

What damages are "recoverable by law by abutters on ways discontinued by towns" is an inquiry to which our statutes and decisions give no easy or categorical answer. The statutes now in force and most closely relating to the subject are Pub. Sts. c. 49, §§ 66, 68, which give towns the right to discontinue town ways and private ways, and say that "if damage is sustained by a person in his property by the . . . discontinuance of a town way or private way, . . . he shall receive such compensation as the selectmen or road commissioners shall determine." There is contained also in Pub. Sts. c. 49, § 16, a rule for estimating the damage sustained by discontinuing a highway, which is regarded as applicable to damages occasioned by the discontinuance of town ways also, and is that regard shall be had to all the damages done to the party and that the benefit, if any, to his property shall be allowed by way of set-off. The earlier statutes seem to be of no special importance to the present inquiry. See Sts. 1785, c. 75, § 7; 1812, c. 121; 1826, c. 171, § 5; 1827, c. 77, §§ 11, 12; Rev. Sts. c. 24, §§ 70, 76, and also §§ 11, 13, 31; Gen. Sts. c. 43, §§ 60, 62, and also §§ 14, 16. St. 1824, c. 153, § 3. Cases in which the subject has been before this court are *Hallock* v. *Franklin County*, 2 Met. 558; *Fenner* v. *Sheldon*, 11 Met. 521, 524; *Smith* v. *Boston*, 7 Cush. 254; *Perry* v. *Sherborn*, 11 Cush. 388; *Castle* v. *Berkshire County*, 11 Gray, 26; *Hawkins* v. *County Commissioners*, 2 Allen, 254; *Webster* v. *Lowell*, 139 Mass. 172; *Webster* v. *Lowell*, 142 Mass. 324; *Spaulding* v. *Nourse*, 143 Mass. 490; *Davis* v. *County Commissioners*, 153 Mass. 218; *Hammond* v. *County Commissioners*, 154 Mass. 509; *Stanwood* v. *Malden*, 157 Mass. 17; *Nichols* v. *Richmond*, 162 Mass. 170. See also *Pearson* v. *Allen*, 151 Mass. 79, 83; *Shaw* v. *Boston & Albany Railroad*, 159 Mass. 597. In these decisions

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it has been settled that the damage must be the direct and immediate consequence of the discontinuance, and that indefinite, remote, and contingent damages are not recoverable. Inconveniences which the petitioner experiences in common with all the rest of the community, and which consequently are not special or peculiar in kind, he cannot have compensation for, although, in consequence of the proximity of his lots or buildings to the place discontinued, he may feel the inconveniences more than others. Therefore, although the petitioner's land may abut upon the part of the street which is discontinued, if his property is still accessible by public ways, and his only complaint is that access to it is not so easy as before, he cannot recover. But in the leading case of *Smith* v. *Boston*, the court declined to lay down a rule that in no case can a man have damage for the discontinuance of a way unless his land bounds upon it; and in *Webster* v. *Lowell*, a verdict giving damages for narrowing the debouchement of a private way by the discontinuance of a part of the street into which it opened was sustained, although the private way was one gained by prescriptive use in connection with land which in its whole frontage abutted on that part of the same public street which was not discontinued, and so continued to be accessible by a public street. In none of the cases has any claim for damages been considered or passed upon, except claims for cutting off or making more inconvenient the access of travel to some parcel of land.

Besides being open for travel, public streets may be put to many other valuable uses by the owners of abutting estates, and by others, and if the right to make these uses of the street is taken away by the discontinuance of the street, the abutter or the person enjoying the valuable use will be damaged. An abutter may maintain in the street his own particular drain connecting his land with the common or public sewer. He may so maintain his own service pipe connecting the plumbing of his buildings with the street water main of the city or town or of a water company authorized to supply water. He may have his own private wires or pipes in the street connecting his premises with the pipes or wires of gas companies, or of electric light companies or of telephone companies, or of steam heating companies or pneumatic service companies, authorized to have their pipes, wires, or conduits in the street.

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So, too, street railway companies, gas, water, electric light, telegraph, telephone, pneumatic service, steam heating and power, and other like companies may obtain legal permission to have their structures and appliances in the public streets. By the discontinuance of the street, if the abutter or the corporation so using the street had no other right to maintain these structures or appliances than that which depended upon the fact that the place where they were was a public street, but had a right to have them there so long as the street existed, the right would be lost by the discontinuance of the street, and the loser would be damaged. This damage would be neither indefinite, remote, nor contingent, nor experienced in common with all the rest of the community, but would be special and peculiar in each instance. Could it be recovered in all or any of the cases instanced, or would it be held as it was suggested in *Stanwood* v. *Malden*, *ubi supra*, that "it would have been intelligible for the Legislature to say that, when a benefit is conferred upon a landowner, the value of which he does not pay for, he takes it upon the implied condition that he shall not be paid for it when it is taken away?"

Whatever answer may be given to any of these questions, we think that no one now has a right to recover for the discontinuance of a way by a town, unless he can show that some parcel of his land is diminished in value by the discontinuance. It is not enough to show such a diminution in value, if it is caused merely by lessening the convenience of approach, if the land is still freely accessible by public ways. If the diminution in value is caused by the loss of the right to maintain in the street particular drains, pipes, conduits, wires, or the like appliances, even if the damage should be considered a peculiar and special one and recoverable, if the loss of the right did not diminish the value of some parcel of the petitioner's land, he could not recover, although the loss of the right entailed pecuniary loss of some other nature. As the damages "recoverable by law by abutters on highways discontinued by towns" are in our opinion restricted to damages caused by the diminution of the value of land, we think no other damages for the discontinuance of a public way by proceedings for the abolition of a grade crossing are made payable by St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1. In the present case, it is not shown by the agreed

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statement of facts on which the trial was had that the loss of the right to keep its main on Harris Street diminished the value of the gas company's land, and therefore that damage cannot be recovered of the town in the petition against it.

We think that so much of the loss in respect of the Harris Street main as is due to that part of it which was in the portion of the gas company's land included in the street, and, upon the discontinuance of the street taken for the new location of the railroad, was recoverable in the petition against the railroad company, as an element in the value of the land taken and the diminution of the value of the petitioner's remaining land. The gas company did not lose its right to keep that part of the main where it was by the discontinuance of the street, because the gas company had the fee, but did lose the right by the taking for the railroad. Upon that taking the right of the gas company was extinguished, and the damages to be paid for the taking should be assessed in view of the presence of the main in the petitioner's land taken.

According to the terms of the report judgment is to be entered for the town in the first case, and in the second case the verdict is to be set aside and a new trial had. *So ordered.*

MICHAEL J. O'BRIEN & others *vs.* CORNELIUS MURPHY & others.

Essex. November 8, 1899. — February 27, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Continuing Bond.

A bond, after reciting that the obligor had been chosen by the association as treasurer, and as such would receive the property of the association and was bound to keep accurate accounts of money in his hands and to be received by him as treasurer, declared that if he "shall well and truly perform and singular the duties of treasurer of said association for and during the term for which he has been elected and during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office, or to such other person or persons as said association or

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its authorized officers may direct according to the provisions of the constitution, by-law, rules and regulations of said association now existing or which may be by said association adopted, then this obligation shall be void; otherwise to be and remain in full force." The election was for one year, and by the by-laws the office of treasurer was an annual one. At the time the bond was given, the obligor was holding office under his first election. *Held*, in an action on the bond, that the phrase "during such further time as he may continue to hold said office" must be held to apply to such further time beyond the term of one year as the principal might hold the office by virtue of his first election, and that it was not intended to cover the time under which he might hold office under any subsequent election.

CONTRACT, against the obligor and sureties of a bond given by the obligor as treasurer of the Ancient Order of Hibernians, Division No. 3, a voluntary benevolent association. The facts appear in the opinion.

H. I. Bartlett, for the plaintiffs.

A. W. Reddy, (*G. W. Cate* with him,) for the defendants.

HAMMOND, J. In the Superior Court the ruling was that the bond was not a continuing bond, and the demurrer was sustained on that ground; and the only question argued before us is whether this ruling was correct. In view of the conclusion to which we have come, we have not found it necessary to consider the other grounds of the demurrer.

The general rule is that where there is a recital in the bond specifying the time during which the prescribed duty is to be performed by the principal, and the words of the condition are general and indefinite as to the time for which the surety is to be liable, such general words will be construed as limited by the recital, and the surety will be held liable only for the time therein specified. It is fair to presume that the parties had in contemplation only a liability for the time specified in the recital. Brandt, Suretyship, § 166. *Arlington* v. *Merricke*, 2 Saund. 403. *Liverpool Waterworks* v. *Atkinson*, 6 East, 507. In the latter case the bond, after reciting that the defendant had agreed with the plaintiff to collect its revenues "from time to time for twelve months," contained the condition for the faithful performance of the principal "from time to time and at all times thereafter during the continuance of such his employment," and that "so long as he should continue and be employed by the company from time to time observe and perform the orders of their committee as far as the same should concern his said em-

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ployment." The general language was held to apply only to the twelve months.

The same rule is applied where the office or employment is by law or usage limited to a certain time, even if that fact be not recited in the bond. *Bigelow* v. *Bridge*, 8 Mass. 275. *Dedham Bank* v. *Chickering*, 3 Pick. 335. *Amherst Bank* v. *Root*, 2 Met. 522. *Chelmsford Co.* v. *Demarest*, 7 Gray, 1. In this last case the sureties on the bond of the treasurer of a manufacturing corporation who under the statute was to be "chosen annually" and hold his office "until another is chosen and qualified in his stead," were bound only for the year for which he was chosen and for such further time as was reasonably sufficient for the election and qualification of his successor and no longer, although the corporation failed to elect at their next annual meeting, notwithstanding that the condition of the bond stipulated for faithful performance of the principal "during his continuance in said office." Shaw, C. J., in giving the opinion, says: "Perhaps a bond might be framed, reciting that whereas the principal has been elected to the annual office of treasurer, and conditioned for his faithful performance of his duties for that term, and for such further time as he might continue to hold the same by annual re-election — such contract being clear and explicit as to the intent, and made by parties competent to bind themselves — and they remain bound, not because the office was not annual, but because they had anticipated future elections, and provisionally bound themselves accordingly. But the authorities are uniform, that, when the office is annual, the parties to the bond are presumed, by law, to bind themselves accordingly, if there are no words inserted in the bond, clearly extending it to a future election. *Hassell* v. *Long*, 2 M. & S. 363."

And even when there is language in the condition carrying the liability beyond the time for which the principal is elected, it is construed with considerable strictness, and the sureties are held only for such time as is plainly and explicitly therein specified. The leading principle is that the principal is not to be held beyond the precise terms of his contract. Thus, in *Middlesex Manuf. Co.* v. *Lawrence*, 1 Allen, 339, the sureties on a bond of the treasurer of a company conditioned for the faithful

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discharge of his duties "during the term for which he has been elected, and for and during such further time as he may continue therein by any re-election or otherwise" were held not liable for defaults occurring in years when, after being out of the office for a short time, he was again elected. See also *Lexington & West Cambridge Railroad* v. *Elwell*, 8 Allen, 371; *Richardson School Fund* v. *Dean*, 130 Mass. 242.

In the present case the bond, after reciting that the defendant Murphy has been chosen by the association as treasurer, and "by reason whereof and as such treasurer he will receive into his hands and possession divers sums of money, goods, and chattels and other things, the property of said association, and is bound to keep true and accurate accounts of all moneys and sums of money now in his hands and all which he shall receive by virtue of his office as treasurer aforesaid," proceeds as follows: "Now, therefore, if the said Cornelius Murphy shall well and truly perform and singular the duties of treasurer of said association for and during the term for which he has been elected and during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office, or to such other person or persons as said association or its authorized officers may direct according to the provisions of the constitution, by-law, rules and regulations of said association now existing or which may be by said association adopted, then this obligation shall be void; otherwise to be and remain in full force."

It appears by the declaration that the election was for one year, and it was conceded at the argument before us that by the by-laws of this association the office of treasurer was an annual office. Murphy therefore held his office by annual election. At the time the bond was given, he was holding office under his first election. If it was the intention of the parties that the sureties were to be held during the whole time that he should continue to hold his office by annual elections or otherwise, there was no difficulty in plainly expressing that intent. We do not think that intent is plainly expressed in the phrase "during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office." Although the election was

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for only one year, yet it might reasonably be anticipated that there sometimes would be considerable delay in the election and qualification of a successor, either by reason of the failure of the organization to effect an election, or the failure of the person elected to qualify, or from some other cause.

Applying the well settled rules of interpretation applicable to such contracts, we think that the phrase "during such further time as he may continue to hold said office" must be held to apply to such further time beyond the term of one year as the principal might hold the office by virtue of his first election, and that it was not intended to cover the time under which he might hold office under any subsequent election.

Exceptions overruled.

NATIONAL BANK OF COMMERCE *vs.* CITY OF NEW BEDFORD.

Bristol. December 12, 1899. — February 27, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Tax — Abatement — Appeal — Objection to Jurisdiction — Commissioner — Law and Fact — National Bank — Value of Shares — Evidence — Estoppel.

It is no bar to the jurisdiction of the court that an appeal to the Superior Court, under St. 1890, c. 127, for an abatement of taxes, was entered less than thirty days after the assessors had given the appellant notice of their decision under § 2, providing that the entry shall be made "at the return day first occurring not less than thirty days after" such notice of the decision; nor that the appeal was not tried at the first trial term, as provided in § 4, if the objections are not seasonably taken.

A commissioner appointed under St. 1890, c. 127, § 5, upon an appeal to the Superior Court for an abatement of taxes assessed on shares of a national bank, is authorized to find the fair cash value of such shares, and his judgment in matters of fact is not open to revision by this court on exceptions.

An expert may testify to value, although his knowledge of details is chiefly derived from inadmissible sources, but the fact that he may use hearsay as a ground of opinion does not make the hearsay admissible.

The excess of the assets over the liabilities of a national bank at a stated time is of no importance in determining the fair cash value of its shares for the purposes of taxation, where there is sufficient evidence of a sum for which the shares could have been sold on that date.

A national bank, at the trial of a petition for the abatement of a tax assessed upon its shares, supported the report of a commissioner that the fair cash value of its

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shares for the purposes of taxation was their market value as found by him. Subsequently the bank voted to petition for an abatement of the tax for 1897 upon the basis of the difference between the assessed valuation and the fair cash value of its shares based on the cash sales on or about May 1 of that year. The assessors had requested the bank to submit a statement of the price at which its shares were actually sold at the last sale prior to May 1, mentioning that the last quoted sale before that day was at a certain rate, to which the bank made no reply. *Held*, that the bank was not estopped to set up that the fair cash value of its shares for the purposes of assessment was less than the cash sales on or about May 1, 1897.

APPEAL to the Superior Court, under St. 1890, c. 127, from the decision of the assessors of the respondent city, on a petition for an abatement of taxes assessed upon the shares of the petitioner. Trial, without a jury, before *Braley*, J., who found for the petitioner; and the respondent alleged exceptions. The facts appear in the opinion.

L. LeB. Holmes, for the respondent.

O. Prescott, Jr., for the petitioner.

HOLMES, C. J. This is an appeal to the Superior Court, under St. 1890, c. 127, for an abatement of taxes, and is here on exceptions. It was entered, we assume, in less than thirty days after the assessors had given the appellant notice of their decision under § 2, and the suggestion is made at the outset that this is fatal to the jurisdiction by the terms of that section. But, so far as we can see, if this point is open to the respondent, the provision for entry at the return day first occurring not less than thirty days after notice is only for the convenience of the city or town concerned as party to the litigation, and does not go to the jurisdiction of the court in such a sense that the court is not at liberty to proceed with the case if an early entry is allowed to be made without objection. No objection was taken in this case. The averment in the tardily filed answer that "the taking, entering, and prosecuting of this appeal was not authorized" goes to a different point, namely, the meaning of the directors' vote authorizing the petition, as to which some argument is made. We are aware of the strict rule that has been applied in some cases to an attempt to enter late when the party's rights are barred, but it does not seem to us that the same strictness should be extended to entries made too soon, when the right to enter is outstanding and a proper entry could be made if the party had notice that the letter of the law was insisted upon. *Palmer*

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v. *Dayton*, 4 Cush. 270. *Eddy's case*, 6 Cush. 28. *Custy* v. *Lowell*, 117 Mass. 78.

The Superior Court was asked to rule that it had no jurisdiction because the appeal was not tried at the first trial term as provided in § 4. The reason for the delay seems to have been that the respondent had not filed an answer, but it now contends that no answer was necessary and that the right of the Superior Court to try the appeal expired with its first sitting. What happened was that after the answer was filed the court appointed a commissioner under § 5, by agreement. We do not care to say more of the respondent's position than that the provision for early trial is for the respondent's benefit, could be waived by it, and, even more plainly than that concerning entry, does not go to the jurisdiction of the court.

Another suggestion was made that the directors' vote authorizing the petition authorized it only to the extent that the assessed valuation exceeded the fair cash value "based on the cash sales on or about" May 1, 1897. Probably the cash sales referred to were cash sales which the petitioner offered to prove but was prevented from proving by the objection of the respondent. If so, we cannot tell what the supposed limit would be; but, further, we think that the vote meant to authorize application for whatever abatement the bank could get, and as the city withdrew this objection before the commissioner we are surprised that it should have been renewed here.

We pass to the questions upon the merits. The tax rate was $16.20 per thousand dollars. The assessors found the fair cash value of the shares of the bank to be $73.65 a share (in excess of realty), and assessed a tax of $11,931.50. The Superior Court granted an abatement of $2,211.37 and interest. The case had been referred to a commissioner, as we have stated, under St. 1890, c. 127, § 5, and was heard on his reports. The abatement seems to have been reached by adopting the commissioner's finding that the fair cash value of the shares was $60 a share, subject to a possible question of law which we shall mention but which is not open now. It is objected in the first place, we presume under the request for a general ruling that the petitioner was not entitled to an abatement, that the commissioner was not authorized to find the value of the shares, as that was the issue to

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be determined, but only facts relevant to the determination of that issue by the court. We cannot agree to the objection. The fair cash value was itself a question of fact, and the fact that it was an issue did not withdraw it from the cognizance of the commissioner any more than a similar fact necessarily would withdraw a particular conclusion from the sphere of testimony. *Poole* v. *Dean*, 152 Mass. 589, 591.

On the first of May, 1897, the bank was in the midst of a local panic or depression due to recent revelations concerning some of the New Bedford mills. The last auction sale of the stock was in November, 1896, at $80 a share. This was before the depression. The next one proved was in November, 1897, at $59.50. Experts set the value on May 1 at from $45 to $55. The respondent says that their testimony should not have been admitted, or at least should not have been followed, but that the respondent should have been allowed to prove private sales, stock quotations from the files of a newspaper, and "the intrinsic value of the assets of the bank," after paying all its liabilities, and that the commissioner erred in excluding this evidence and in disregarding, as he said that he did, the returns made by the bank to the comptroller of the currency according to which the stock should have been worth $123 or $124 a share. A ruling was asked to the effect that the cash sales about May 1 were for $80, and therefore that the petitioner was not entitled to an abatement.

A portion of the argument for the respondent is addressed rather to matters of fact than to questions of law, and therefore is not pertinent to the case in its present stage. For instance, when the commissioner reports that he "disregards" the evidence of the returns he does not mean that he rules it to be inadmissible, for he ruled the other way, but he means that as a judge of facts he finds it untrustworthy and uninstructive for good reasons, which he gives. We have nothing to do with his judgment on this point. So the degree of importance to be attached to the testimony of the experts is not to be discussed here, and, generally, which elements of the admissible evidence should have the prevailing weight in fixing the value to be determined is for the judge of facts. Upon the same principle the ruling requested, even if the premise that the sales about May 1

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were for $80 had been undisputed, was for a conclusion which was not matter of law. It was a question of fact not only whether the sales were proved, but also whether they afforded a fair criterion of value.

The respondent argues as if it had saved an exception to the exclusion of evidence of private sales of stock from April 24, 1897, to November 3, 1897. But it appears from the record that this evidence was offered by the petitioner and objected to by the respondent. It is enough to add that we think the commissioner probably was right in considering the evidence uninstructive under the conditions not denied to have existed on the first of May. *Eaton* v. *Mellus*, 7 Gray, 566, 579, 580. He was right also in rejecting newspapers purporting to contain stock quotations furnished by named New Bedford stockbrokers who could have been called. *Whelan* v. *Lynch*, 60 N. Y. 469, 474. *Schmidt* v. *Herfurth*, 5 Rob. (N. Y.) 124, 145. See *Silverstein* v. *O'Brien*, 165 Mass. 512; *Ashworth* v. *Kittridge*, 12 Cush. 193; *Payson* v. *Everett*, 12 Minn. 216, 219.// An expert may testify to value although his knowledge of details is chiefly derived from inadmissible sources, because he gives the sanction of his general experience. But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible.// See *Whitney* v. *Thacher*, 117 Mass. 523, 527; *Finnegan* v. *Fall River Gas Works Co.* 159 Mass. 311; *Smith* v. *North Carolina Railroad*, 68 N. C. 107, 116; *Central Railroad & Banking Co.* v. *Skellie*, 86 Ga. 686, 693, 694; *Hoxsie* v. *Empire Lumber Co.* 41 Minn. 548, 551; *Laurent* v. *Vaughn*, 30 Vt. 90, 94, 95; *Thatcher* v. *Kaucher*, 2 Col. 698. In *Fennerstein's Champagne*, 3 Wall. 145, and possibly in *Cliquot's Champagne*, 3 Wall. 114, the Supreme Court of the United States showed its willingness to go a little further than this court has gone, although not so far as to let in these newspapers. A later case is more cautious in its expressions. *Chaffee* v. *United States*, 18 Wall. 516, 542. In *Sisson* v. *Cleveland & Toledo Railroad*, 14 Mich. 489, 497, and *Peter* v. *Thickstun*, 51 Mich. 589, 593, the precise facts do not appear. If it was held that newspaper reports are admissible under some circumstances, when better evidence is not attainable, we do not need to differ from the decision in this case, as here the sources of the reports were at hand. See Whart. Ev. (3d ed.) § 674.

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The exception mainly relied upon seems to be that which was taken to the exclusion of evidence that "the intrinsic value of the assets and property of the petitioner bank on May 1, 1897, was, after paying all its liabilities, in excess of an amount equivalent to eighty dollars per share of its capital stock." In view of the former decision between these same parties, 155 Mass. 313, the respondent is driven to the argument that, although such evidence would not be controlling, it is admissible. But under the circumstances of this case the argument is merely technical, — an argument for a right which could have no influence on the case. There was an ascertainable sum for which these shares could have been sold on May 1, and that being so, it was useless to prove that the public ought to have been willing to give more.

It is true that it has been held, not without hesitation, that at common law you could look behind market values to get at corrected values as shown by subsequent events, in an action for fraudulent representations where the fraud which deceived the plaintiff also may have deceived the public. *Whiting* v. *Price*, 172 Mass. 240, 242. But, generally speaking, when a statute requires the "fair cash value" of property on a certain day to be ascertained, Pub. Sts. c. 13, § 8, it refers to the actual judgment of the public as expressed in the price which some one will pay, not to what the court at a later time may think would have been a wiser opinion. It means the highest price that a normal purchaser, not under peculiar compulsion, will pay at that time to get that thing. *Bradley* v. *Hooker*, 175 Mass. 145. If the word "fair" is thought to add a little latitude to the definition and to allow a correction of whatever was the fleeting accident of a moment of panic by the consideration of values on either side of the precise time fixed by the statute, that correction has been made, by setting the value of the stock at sixty rather than at fifty dollars. The commissioner added ten dollars a share for that very purpose. But it appears to us that the excess of assets over liabilities is of no importance for that purpose, as it throws no light whatever upon the selling prices of the stock. There was sufficient evidence upon which to form an opinion of the selling price, defined as we have defined it, without the need of resorting to such indirect methods of getting

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at it, and therefore the attempt to divert the inquiry into a wrong channel was met properly enough by a rejection of the evidence.

A ruling was asked and an argument is made that the bank is estopped to set up that the fair cash value of its shares for the purpose of assessment was less than the cash sales on or about May 1, 1897, and that those sales were at $80 a share. We have said or implied already that it does not appear that the sales nearest to May 1 and before that date were fair tests of value at the time, and of course it does not appear that they were fair tests of value on May 1, after the storm had struck the market. We have mentioned that the sales referred to in the vote to apply for an abatement possibly if not probably referred to sales not put in evidence. But if there had been a sale at public auction on the first of May and the vote had referred to it in terms, we still should be quite at a loss to see any element of estoppel in the conduct of the bank, whether in the vote, or in trying the case reported in 155 Mass. 313, or in not informing the assessors of sales later than April 24, or for less than $80,* and, as we do not find a shadow of a ground for one in the argument for the city, we shall not spend time in establishing a negative. *Troy Cotton & Woolen Manuf. Co.* v. *Fall River*, 167 Mass. 517, 520.

The difficulty of dealing with this case has been enhanced by the failure of the argument to follow the exceptions or to refer to them in such a way as to make clear upon what particular ruling or refusal to rule it was proceeding. But we have examined it and compared it with the bill of exceptions, and we are satisfied that no error is made out. *Exceptions overruled.*

* The vote authorized the cashier to execute on behalf of the bank a petition for the abatement of the tax for 1897, "based upon the difference between the assessed valuation per share and the fair cash value thereof based on the cash sales on about the first day of May, 1897." Soon after the first of May the assessors wrote to the cashier of the bank, requesting him to submit to them a statement of the price at which shares of the bank were actually sold at the last sale prior to May 1, 1897, and mentioning that, according to a list published in a local paper on April 28, the last sale of the bank stock was at the rate of $80 per share; to which the bank made no reply.

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COMMONWEALTH *vs.* TIMOTHY L. MORRISSEY.

Berkshire. January 8, 1900. — February 27, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Indictment for Adultery — Evidence.

It is an answer, in a criminal case, to the question whether it is competent to convict upon an uncorroborated confession, that question being an abstract one, not raised upon the evidence and on which the court was not required to express an opinion, that the undisputed facts were sufficient corroboration.

INDICTMENT, for adultery. At the trial in the Superior Court, before *Stevens*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

P. J. Moore, for the defendant.

C. L. Gardner, District Attorney, for the Commonwealth.

HAMMOND, J. The defendant was indicted for adultery with Bridget Lee. At the trial it appeared that at the trial of a complaint for bastardy made by the said Bridget Lee, who was a single woman and had been delivered of an illegitimate child, against one Curry charged with being the father of the child, in which the issue was whether Curry was the father of the child, this present defendant, being duly sworn as a witness, testified that on three several occasions, one being the day named in the indictment, at Hinsdale in the County of Berkshire, he had carnal knowledge of the body of the said Lee, and that he was on all such occasions a married man.

It is to be assumed that this evidence was there introduced to show that by reason of such sexual intercourse there might be a doubt as to whether the defendant in that suit was the father of the child, since that was the ground upon which such evidence was admissible; and this testimony could throw doubt upon that issue only upon the theory that the conception of the child might have occurred as the result of such intercourse.

Since the woman was delivered of a child, the natural inference is that she had had sexual intercourse with a man; and as

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she had never been married, there was evidence that a crime had been committed, fornication or adultery, according as the man was single or married at the time. The evidence lacking was simply as to the identity of the man, and that evidence was furnished by the confession of the defendant. Under these circumstances, the question whether it was competent to convict upon an uncorroborated confession was an abstract one, not raised upon the evidence, and on which the court was not required to express an opinion. The undisputed facts were sufficient corroboration, if any was needed. *Commonwealth* v. *Tarr*, 4 Allen, 315. *Commonwealth* v. *McCann*, 97 Mass. 580.

Exceptions overruled.

JOHN GREEN & others *vs.* FRANCIS A. GASKILL, executor, & another.

Worcester. October 20, 1899. — February 28, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Equity Jurisdiction of the Probate Courts — Right of Trustees to have Accounts adjusted in Probate Court.

The equity jurisdiction given by statute to the Probate Courts over all cases relating to trusts created by will and the termination thereof is a concurrent jurisdiction shared by the Superior Court and by this court; and while the fact that in the records of the Probate Courts are found the wills under which such trusts arise and the inventories and accounts of the trustees, with their official bonds, the proceedings under which they were appointed and other matters affecting the trust, may have been a reason for conferring this concurrent jurisdiction, it does not enlarge that jurisdiction or enable those courts to entertain any bill which could not also be entertained by the Superior Court or by this court; nor does it enable a Probate Court upon its equity side to do any of those things upon a bill in equity with reference to such a trust which can be done by a Probate Court under its probate jurisdiction only.

Trustees appointed by a Probate Court, as well as guardians, administrators, and executors so appointed, have a right to have their accounts adjusted and the amounts due to or from them as trustees determined in the Probate Court, on its probate side and in the usual probate proceedings, and they cannot be compelled first to render their accounts or made to pay over the fund, by proceedings in equity or at law, save after and in pursuance of such an adjustment and determination on the probate side of the court.

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BARKER, J. One John Green, who died in the year 1865, left by his will one fifth of the residue of his estate in trust. The first trustee was Meltiah B. Green, who during his life was entitled to apply the income of the fund for the benefit of himself and his family, keeping the principal unimpaired. From the time of his death without issue on May 24, 1888, his widow, Mary S. Green, was entitled to the whole income of the fund during her life. After the death of Meltiah B. Green the defendant Gaskill was appointed trustee of the fund, a position which he still holds. Mary S. Green, the widow, was appointed as executrix of the will of Meltiah B. Green on October 2, 1888. She died on January 7, 1896, and upon her death the plaintiffs became under the will of John Green entitled as remainder-men to one half of the principal of the trust fund.

Mary S. Green, as executrix of Meltiah B., on September 28, 1895, filed in the Probate Court an account of Meltiah B. as trustee of this trust fund, and that account has never been allowed. On June 29, 1896, Gaskill, as trustee of the fund, filed an account of his trust in the Probate Court. On January 29, 1896, Gaskill was also appointed executor of the will of Mary S. Green. On March 3, 1896, the defendant Parker was appointed administrator *de bonis non* with the will annexed of Meltiah B. Green.

In January, 1898, the plaintiffs filed upon the equity side of the Probate Court the present bill in equity against Gaskill as executor of the will of Mary S. Green, and as trustee under the will of John Green, and against Parker as administrator *de bonis non* with the will annexed of Meltiah B. Green. The bill alleges, in addition to the facts already stated, that the trust fund first placed in the hands of Meltiah B. Green as trustee was of about $30,000 in amount; and that during his life he appropriated to his own use a large part of the principal of the fund, amounting to about $10,000, impressed with the trust, and which at his death formed part of his estate. That by his will he gave all of his estate to his widow, who knew that he had appropriated the $10,000 of the trust fund to his own use, and that in her hands it was still impressed with the trust. That upon her death this property still impressed with the trust has come into the hands of Gaskill as executor of her will. That

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the plaintiffs are entitled, the trust being now ended by the death of Mary S. Green, to one half of all the principal of the trust fund, including the part of the fund appropriated by Meltiah B. Green in his lifetime to his own use, and now in the hands of Gaskill as executor.

The prayer is that an account may be taken of all the funds which came to the hands of Meltiah B. Green as trustee of the fund, and of the proceeds thereof, if the same have ever changed in form; also an account of all funds belonging to the trust fund which came to the hands of Mary S. Green as executor of her husband's will, with knowledge by her of their misappropriation by her husband to his own use, and of all which came to the hands of Gaskill as executor of her will; and also an account of all funds, if any, belonging to the trust estate which have come to the hands of the defendant Parker as administrator *de bonis non* with the will annexed of Meltiah B. Green; "and that one half of the same may be decreed to be paid over by the parties now holding the same in any of their said capacities to the plaintiffs according to their interests therein," and for other relief.

There are also allegations that Meltiah B. Green never filed in the Probate Court an inventory of the trust estate, and never filed in that court an account of the trust; and that Gaskill has never filed an inventory of the trust estate, and that he has not included in his trustee's account filed on June 29, 1896, the part of the trust fund which Meltiah B. in his lifetime wrongfully appropriated to his own use.

In the Probate Court Gaskill appeared as trustee and as executor, and answered, denying any misappropriation of any part of the trust fund by Meltiah B. Green, and denying that as executor of the will of Mary S. Green he has any funds belongto or impressed with the trust, and alleging that he has duly filed in the Probate Court his final account as trustee of the fund, and that the same has been finally and conclusively allowed in the Probate Court; and also demurring to the bill because the plaintiffs have a full, complete, and adequate remedy at law by proceedings in the Probate Court upon the accounts of the defendants, and by suits, as well as because of the laches of the plaintiffs, and because the bill is multifarious. The

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cause was heard upon the demurrer in the Probate Court upon its equity side, and the demurrer was there sustained and a decree entered, dismissing the bill with costs, in favor of the defendant Gaskill as trustee and as executor. From this decree the plaintiffs appealed to the Supreme Judicial Court, and the case was then heard by Mr. Justice Knowlton upon the bill and the demurrer of the defendant Gaskill, and was reserved for the consideration of the full court.

It is to be noticed that the bill contains no allegations stating the nature of that part of the trust property alleged to have been misappropriated by the first trustee to his own use, and to be now in the hands of Gaskill as executor of the will of Mary S. Green, nor does it allege that that property was so ear-marked as to be capable of identification. Nor does the bill allege that any part of the trust property is in fact now in the hands of Parker as administrator *de bonis non* with the will annexed of the first trustee.

While the Probate Courts in the several counties have equity jurisdiction over all cases and matters relating to trusts created by will, St. 1891, c. 415, § 1, and have long had equity jurisdiction over all matters relating to the termination of such trusts, St. 1880, c. 163; Pub. Sts. c. 141, § 27, this is a concurrent jurisdiction shared by the Superior Court and by this court. While the fact that in the records and files of the Probate Courts are found the wills under which such trusts arise and the inventories and accounts of the trustees, with their official bonds, the proceedings under which they were appointed and other matters affecting the trust, may perhaps have been a reason for conferring this concurrent jurisdiction in equity upon the Probate Courts, it does not enlarge that jurisdiction, or enable them to entertain any bill which could not also be entertained by the Superior Court or by this court. Nor does it enable a Probate Court upon its equity side to do any of those things upon a bill in equity, with reference to such a trust, which can be done by a Probate Court under its probate jurisdiction only. See *Bennett* v. *Kimball*, *ante*, 199.

If the defendant Gaskill had in his hands as executor of the will of Mary S. Green property of the trust which could be identified and followed as belonging to the trust, the trust hav-

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ing now terminated by its own limitation and the plaintiffs being entitled under the will of its founder to an interest in the property as their own, they might no doubt in a proper bill brought in any competent equity court, reach that property and recover their interest in it. *Holland* v. *Cruft*, 20 Pick. 321, 326. *Moore* v. *Hazelton*, 9 Allen, 102. So also, if as trustee of this trust he has in his hands property of the trust which so belongs to the plaintiffs, they may, when the amount for which he is liable as trustee has been determined by the proper tribunal, by a proper bill in any equity court having jurisdiction of the parties compel him to pay to them their share of the property. But it is a settled principle of our law that trustees appointed by a Probate Court, as well as guardians, administrators, and executors so appointed, have a right to have their accounts adjusted and the amounts due to or from them as trustees determined in the Probate Court, on its probate side, and in the usual probate proceedings; and that they cannot be compelled first to render their accounts, or made to pay over the fund, by proceedings in equity or at law, save after and in pursuance of such an adjustment and determination on the probate side of the court. *Jennison* v. *Hapgood*, 7 Pick. 1, 7. *Conant* v. *Kendall*, 21 Pick. 36. *Wilson* v. *Leishman*, 12 Met. 316. *Sever* v. *Russell*, 4 Cush. 513. *Brooks* v. *Brooks*, 11 Cush. 18. *Munroe* v. *Holmes*, 9 Allen, 244. *Prentice* v. *Dehon*, 10 Allen, 353. *McLane* v. *Curran*, 133 Mass. 531. *Foster* v. *Foster*, 134 Mass. 120. *Murray* v. *Wood*, 144 Mass. 195. *Ammidown* v. *Kinsey*, 144 Mass. 587. *Thorndike* v. *Hinckley*, 155 Mass. 263. *Foster* v. *Bailey*, 157 Mass. 160. *Tyler* v. *Wheeler*, 160 Mass. 206, 210. See also *Southwick* v. *Morrell*, 121 Mass. 520.

While the bill alleges that the defendant Gaskill has filed an account of his trust, it is silent as to the action of the Probate Court upon that account, and even if it has been there disposed of, it is certain that the plaintiffs do not here seek to recover of him upon the basis of that account or of any determination of the Probate Court upon it, because the bill alleges that that account does not include that part of the trust property which had been misappropriated by the first trustee, and which it alleges is now in Mr. Gaskill's hands in another capacity than as trustee, while the bill seeks to recover the plaintiffs' share of

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that part of the fund, as well as of the property which is conceded to belong to the trust. The bill cannot be maintained as if it were one to compel the defendant Gaskill as trustee to pay to the plaintiffs their share of a fund, the amount of which in his hands has been determined in accordance with his right in probate proceedings, because the bill does not contain the necessary averments. It cannot be maintained to charge him as trustee with the part of the fund which it alleges was diverted from the trust by a former trustee, because he can be charged with liability in his capacity as trustee, with reference to that part of the fund, only by showing a neglect of his duty as trustee to recover the trust property so diverted. It is his right to have that question determined in the Probate Court, upon its probate side, or by a suit upon his official bond as trustee. The plaintiffs upon the statements of the bill have such an interest as would at all times have enabled them to be heard upon the settlement of the accounts of the trustee, to petition for his removal, or to ask that his official bond be put in suit.

Nor are the circumstances such as to require a court of equity to allow the plaintiffs to pursue the same bill against this defendant in his two capacities of trustee and of executor. There are questions as to the rights of the plaintiffs as against the trust with which the estate of Mary S. Green is not concerned, and the bill cannot be treated as if it were merely an attempt to follow and recover from her estate identified trust funds.

The allegations that the former trustee filed no inventory and that he filed no account, and that the defendant filed no inventory as trustee, do not give the plaintiffs a right to equitable relief. It is therefore unnecessary to consider whether the joining of the defendant Parker or the alleged laches of the plaintiffs are also good grounds of demurrer, and on those questions we express no opinion.

For the reasons stated the demurrer should be sustained and the bill dismissed with costs. But as it is conceded that there is a trust fund in which the plaintiffs are interested although they cannot maintain this bill, the decision should be without prejudice to their rights, if any, in the fund. There should be a decree in the court below sustaining the demurrer and dismissing the bill with costs as against the defendant Gaskill, but

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without prejudice to the plaintiffs' rights, if any they have, in the trust fund under the will of John Green, held originally for the benefit of Meltiah B. Green, and terminated by its own limitations by the death of Mary S. Green.

So ordered.

J. Green & F. P. Goulding, for the plaintiffs.
H. Parker, for the executor.

JOSEPH L. HANKINSON *vs.* LYNN GAS AND ELECTRIC COMPANY.

Essex. November 8, 1899. — February 28, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Personal Injuries — Master and Servant — Action — Evidence.

In an action against an electric corporation for personal injuries occasioned to the plaintiff by being struck in the eye, as he was driving along a street, by a burnt carbon thrown by A., who, as a servant of the defendant, had removed it from a lamp for the purpose of replacing it by a new carbon, A. testified that he ordinarily dropped the disused pieces of carbon somewhere near the base of the post on which the lamp was; that if there was any good reason why he could not drop them there, he tossed them out into the street; and that he intended to be careful not to drop them on a passer by. He further testified as follows: "I wanted to attract his attention so as to speak to him, and I threw the carbon at the team so as to attract his attention, so that I might speak to him, and not for any business connected with the company." *Held*, that it was a question for the jury whether the explanation given by A. of the purpose which he had in throwing the carbon was true or not. *Held, also*, that the evidence of a witness, who testified that A., when taxed by the plaintiff with having through carelessness injured his eye, said, "I am sorry; it was an accident; I did n't mean to do it," was rightly admitted.

TORT, for personal injuries occasioned to the plaintiff by being struck in the eye by a burnt carbon thrown by one Bayrd, who was in the defendant's employ. At the trial in the Superior Court, before *Richardson*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. Lowell & J. H. Pearl, for the defendant.
J. H. Sisk, for the plaintiff.

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LORING, J. The defendant requested the presiding justice to direct a verdict for the defendant, and excepted to his refusal to give that ruling. This was the only ruling requested and this is the only exception taken in connection with the charge of the judge. The jury were instructed that if the carbon which struck the plaintiff in the eye was thrown by Bayrd "for the purpose of carrying out and performing his duty in his employment," the defendant was liable, and, on the other hand, if the carbon was thrown by Bayrd "to carry out some whim of his own, in accordance with some impulse of his own, and not for the purpose of carrying out or accomplishing the purposes for which he was then and there employed, the defendant would not be liable." This was in accordance with the rule laid down in *Howe* v. *Newmarch*, 12 Allen, 49, which has been followed and acted upon in many subsequent cases. This is admitted by the defendant, and no exception is taken to this ruling. The only contention made by the defendant is that there was no evidence on which the jury could find that the carbon was thrown by Bayrd for the purpose of performing the work he was hired by the defendant to perform.

But if the jury disbelieved Bayrd's explanation of the purpose which he had in mind in throwing the carbon there was ample evidence that the carbon was thrown by Bayrd in performance of the work he was hired to perform. He was hired to remove the remains of the four carbons left in the lamp in question after it had burned during the preceding night and to replace them by four new carbons for the coming night. The plaintiff was struck as he was driving by, and just outside of, the defendant's cart, which Bayrd had left standing at the foot of the pole on which he was at work discarding the old carbons. These carbons are discarded by being dropped or thrown into the street. Bayrd testified, "I ordinarily drop these disused pieces of carbon somewhere near the base of the post on which the lamp is. If there is any good reason why I cannot drop them there, I toss them out into the street. I intend to be careful not to drop them on to a passer-by or to strike a horse as he is driven along by that pole." This warranted the jury in finding that the carbon which struck the plaintiff in the eye was being discarded by Bayrd in the performance of the duty which he was hired by

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the defendant to perform, and in finding for the plaintiff under the rule stated in the charge to the jury.

The defendant's contention is that Bayrd's statement — "I did not throw it at the team for any purpose connected with my business, but to attract his attention. I wanted to attract his attention so as to speak to him, and I threw the carbon at the team so as to attract his attention so that I might speak to him and not for any business connected with the company" — is conclusive upon the jury and the plaintiff; but when the defendant's liability depends upon the purpose with which an act, that is nearly neutral so far as outward manifestations are concerned, is done, it would be strange if the jury were not at liberty to disbelieve the testimony of one employed by the defendant as to his mental processes. In that connection it was proper for the jury to take into consideration the fact that not only was this witness at the time of the trial in the employ of the defendant, but also that he had been taken back into its employ only two weeks before the trial; and the jury may have also believed that from the terms in which his testimony was couched it was evident that the witness had a particular knowledge of what the law required to exonerate the defendant from liability. We are of opinion that it was a question for the jury whether the explanation given by Bayrd of the purpose he had in throwing the disused carbon was true or not. *Merchants' National Bank* v. *Haverhill Iron Works*, 159 Mass. 158. *Commonwealth* v. *McNeese*, 156 Mass. 231. *Twombly* v. *Monroe*, 136 Mass. 464.

The question whether the testimony given by Foss should have been admitted is a close one, but on the whole we are of opinion that it was rightly admitted. It seems to us, on the whole, that it was more natural for a man in Bayrd's position, when taxed by the plaintiff with having through his carelessness nearly, if not quite, caused the loss of his eye, to answer that he was tossing the carbon at his cart to attract his attention and that he, the plaintiff, unexpectedly thrust out his head at just the wrong time, than it was to say, "I am sorry; it was an accident; I didn't mean to do it," and not to give the explanation which he now testifies to.

The presiding justice carefully limited the use to be made of the evidence when it was offered and admitted, and if the defend-

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ant desired that further instructions should be given on the point in the charge to the jury, (as it was intimated by the judge he should do, when the evidence was admitted,) his counsel should have called it to the attention of the judge; and not having done so, and not having excepted for that reason to the charge given, has now no ground for complaint. *Exceptions overruled.*

TERENCE O'BRIEN *vs.* ELLEN F. KEEFE & another.

Essex. November 8, 1899. — February 28, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Equity Practice — Master's Report — Exceptions — Evidence.

The only purpose served by exceptions to a master's report in equity is taking an appeal to rulings made by him. The statement of what rulings were made by the master must appear in his report or otherwise on the record of the cause, and any statement of them in the exceptions will be disregarded as impertinent.

If exceptions are taken to rulings alleged to have been made by a master in a cause heard by him under a decree directing him to hear the cause and find the facts, and the record does not disclose that the rulings alleged to have been made were made by the master, the exceptions must be overruled.

If testimony identifying a witness as the person who was convicted of a crime, the details of which are stated, is admitted *de bene* by a master at the hearing before him, on the counsel introducing the testimony stating that he expects to introduce a record of the witness's conviction of the crime in question, and such record is not produced and no motion is made to have the testimony ruled out, and the master, in a supplemental report made under an order recommitting the cause to him and directing him to state what action he took as to this evidence, states that, in considering the evidence in the case, he treated this testimony as if it had been ruled out, and that neither counsel referred to it in the argument of the case in which they discussed the weight of the witness's testimony and his character, an exception taken to the admission of the evidence *de bene* is properly overruled.

At a hearing before a master, the chief of police of a town was summoned as a witness for the purpose of procuring the records of a trial justice which were not forthcoming. On his testifying to his ignorance of the records, he was asked, "Have you got any papers with you?" and he testified, "that he had his day-book." He was then asked if he had known a certain witness for a good many years, and he testified that he had known him "quite a number of years." This was objected to. The master, in the supplemental report mentioned above, stated that this testimony, together with the testimony as to the identity of the witness, was not considered by him or referred to in argument, and was treated as ruled out. *Held*, that the plaintiff did not show that he was prejudiced by the admission of the testimony.

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It is proper for a master in equity to whom a cause has been recommitted as stated above, to state in a supplemental report that he treated certain evidence as ruled out which was admitted *de bene* and not subsequently made good, and which the objecting party neglected to move should be ruled out.

BILL IN EQUITY, filed in the Superior Court, to have a trust declared for the benefit of the plaintiff in certain property devised by his father to the first named defendant. The case was referred to a master, and afterwards was recommitted to him. A decree was entered, overruling the plaintiff's exceptions to the original and supplemental reports of the master, confirming the reports, and dismissing the bill; and from the order of recommittal and the decree the plaintiff appealed to this court. The facts appear in the opinion.

F. H. Tarr, for the plaintiff.

H. P. Moulton & C. A. Russell, for the defendants.

LORING, J. This case comes up on two appeals taken by the plaintiff one from an order of the Superior Court recommitting the cause to the master to whom it was originally sent, and the other from a decree overruling exceptions to the master's original and supplemental reports. The plaintiff has undertaken to present to this court questions as to the admission and rejection of testimony offered at the original hearings before the master, questions as to the refusal of the master to incorporate in a supplemental report certain alleged facts, and to strike out from that report certain statements contained therein. The way in which these questions are presented is by a paper drawn up as a bill of exceptions is drawn up at law, stating the rulings of the master, the evidence on which they were based, the grounds taken by the plaintiff in objecting thereto, and concluding with the statement that the plaintiff is aggrieved and with a prayer that his exceptions be allowed. The plaintiff evidently supposed that exceptions to a master's report in equity and a bill of exceptions in an action at law were one and the same thing and served the same purpose; while the fact is that they are quite different things and serve widely different purposes.

Bills of exception in actions at law were introduced by statute (13 Edw. I. c. 31) for the sole purpose of incorporating into the record rulings made by the judge while presiding at the trial of the cause; at common law these were no part of that record.

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The sole purpose served by an exception to a master's report in equity is to take an appeal from a ruling, which is stated in the record of the suit in equity, to wit, the master's report. The bill of exceptions at law is an addition to the record, and when the record was thus completed, the appeal was originally taken by suing out of the appellate court a writ of error, bringing the record, including the bill of exceptions, before the appellate court for revision; and such was the practice in Massachusetts, until the present statutory process of entering the exceptions in the appellate court was instituted by St. 1820, c. 79. For an early case in Massachusetts where a bill of exceptions was sealed in the Court of Common Pleas, under Statute Westminster 2, 13 Edw. I. c. 31, and the question so spread upon the record was carried to this court by writ of error, see *Cogswell* v. *Dolliver*, 2 Mass. 217. An exception to a master's report in equity serves the same purpose as that formerly served by the writ of error and now served by entering a bill of exceptions under the statute; it is the act of appealing from rulings appearing of record, and nothing more. It ought not to contain any statement of what those rulings are, and any such statement incorporated in an exception to a master's report in equity must be disregarded as impertinent.

In the case at bar, the master states in his report: "I settled the foregoing draft of my report, which being read to the counsel, they made no objections to the report of the evidence, but the plaintiff made, then and there, the same objections to my admission and refusal to admit evidence offered by them at the hearing which they made at the hearing, which are stated in the report of the evidence." The report of the evidence has not been printed, and in the absence of that portion of the record, few of the exceptions taken by the plaintiff would present to this court any question were it not that in the order recommitting the cause to the master, the Superior Court refers to "the questions objected to and excepted to by the plaintiff, as the same appear in the bill of exceptions of the plaintiff, and numbered 3, 4, 5, 6, and 7." We think that we must take this action of the Superior Court, which had before it the report of the evidence containing a statement of the rulings made by the master, as an adoption by it of the plaintiff's

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statement of what the master's rulings were, and we shall treat it as such.

1. Exceptions 3, 4, 5, and 6 are exceptions taken to questions put by the defendants on the cross-examination of John E. Sullivan. John E. Sullivan was the principal witness for the plaintiff, and especial importance attaches to the admission of these questions, because the issue between the parties depended upon the credibility of the witnesses on the one side and on the other. On his cross-examination, against the objection of the plaintiff, the defendants were allowed to ask Sullivan if he was the Sullivan (1) who was convicted of being drunk about July 16, 1887; (2) who some time after was arrested by Mr. Savage and fined for an assault; (3) who was arrested for indecently exposing his person, and tried and convicted; (4) who was fined for being a common drunkard, upon which he was committed to Salem jail. The plaintiff objected that until the court record was produced, such questions could not be asked, and stated that there were no such records, that the defendants knew there were no such records, and asked the questions for the sole purpose of confusing and discrediting the witness.

Upon the first hearing upon the plaintiff's exceptions to the master's report, the cause was recommitted to the master to state what action he took in regard to the admission of this testimony and that of James W. Bradley, the chief of police, as set forth in exceptions 3, 4, 5, 6, and 7.

Two so-called supplemental reports of the master have been printed in the record, each without date; we infer that the first is the draft report, (which is no part of the record of the suit and should not have been signed or filed,) and that the second, in the order of printing, is the master's supplemental report. A statement with respect to this evidence is made in both reports, and, though they are not identical, they do not differ in substance. In the last report, the master states: "The defendants' counsel said he was informed and believed there were such records and he would produce them and put them in. I admitted the evidence, understanding that unless the records of conviction were produced and put in evidence, the testimony would not be used and would be stricken out. The testimony of James W. Bradley was admitted some time after

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the plaintiff's counsel had stated that he had made search for the records of the trial justice at Rockport and could not find any of his records, and said to the defendants' counsel that he might make any search or inquiry about these records that he thought best, but I did not find that plaintiff waived any rights by this offer. The defendants did produce a record of the conviction of said Sullivan for an assault and his commitment to the House of Correction in 1886, and put the same in evidence, but not the one inquired about as set forth in the plaintiff's bill of exceptions. The defendants failed to produce the records of conviction in the cases named in the plaintiff's exceptions, and neither party called the master's attention to this testimony before the case was closed, and this testimony was not formally stricken from the record. Counsel for the plaintiff and defendants, in their arguments of the case, discussed the weight of John E. Sullivan's testimony, and his character, but neither of them alluded to the evidence objected to by the plaintiff as set forth in his exceptions numbered 3, 4, 5, 6, and 7. In preparing my report on file in this case, I considered all this testimony which was not supported by the records as though it was stricken out of the case, and did not use or consider it in preparing my report."

It was within the discretion of the master, in determining the order in which the evidence should be introduced, to allow the defendants, upon their counsel stating that he expected to introduce the records of the witness's conviction, to interrogate the witness *de bene* as to whether he was the Sullivan described in the record to be subsequently put in evidence, and it was the right of the plaintiff, upon the defendants' failing to produce the record, to have that testimony so admitted *de bene* ruled out. In the case at bar, no motion to that effect was made by the plaintiff, and the master states that, in considering the testimony, he treated the evidence as if it had been ruled out and that neither counsel referred to this evidence in their arguments of the case, in which they discussed the weight of Sullivan's testimony, and his character.

Such questions as were put to Sullivan may well have confused him, and in this case, which depended upon the credibility of the witnesses on one side or the other, the plaintiff may

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have been injured by the direction thus given by the master in passing upon the order in which the evidence should be introduced; but the possibility of testimony admitted *de bene* not being subsequently made competent is one of the considerations to be passed upon by the presiding magistrate in determining whether to admit such evidence at the time it is offered or not; and it is necessary, in the conduct of trials, that such discretion should be exercised; if evidence admitted *de bene* is not subsequently made good, the only remedy that can be given is, on the proper application being subsequently made, to rule out the testimony. Whether, in such a case, the party, who produces the witness whose testimony has been confused, or the party who has undertaken to assert that the witness is not to be believed because he is a criminal, and it turns out that that assertion is unfounded, is the greater sufferer, is open to question; if he has suffered an injury, it is one inherent in the trial of causes and it is well settled, when such evidence is admitted in a jury trial, that the objecting party cannot be heard to complain, if the evidence is ruled out and the jury are instructed to disregard it. *Smith* v. *Whitman*, 6 Allen, 562. *Selkirk* v. *Cobb*, 13 Gray, 313. *Whitney* v. *Bayley*, 4 Allen, 173. *Commonwealth* v. *Ham*, 150 Mass. 122. So in a hearing before a master, if the testimony is ruled out, it is the duty of the master to disregard it; and a master in chancery, being a person learned in the law, must be taken to disregard evidence thus ruled out, and the objecting party cannot be heard to complain. In the case at bar, the evidence was not formally ruled out, because the plaintiff did not ask to have that done, and, in the absence of such a request on the part of the plaintiff, it was proper for the master to report to the court how the evidence was treated by him. As to the plaintiff's particular complaint that the master was no longer an unbiassed tribunal, the plaintiff had the opportunity of submitting the finding in favor of the defendants on the whole evidence to the Superior Court; and by his ninth exception he exercised that right and had his case heard by an unbiassed tribunal. It is true that the unbiassed tribunal did not hear the case as it would have heard it, had Sullivan not been confused by questions based on unfounded reflections on his character; but whoever is the

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greater sufferer from that, it is a misfortune — if it be a misfortune — necessarily incident to the conduct of trials by human agencies.

We are, therefore, of opinion that exceptions 3, 4, 5, and 6 were properly overruled.

2. The next exception is to the testimony of the chief of police of Rockport, who was asked whether there were any records about Sullivan and testified that he did not know whether there were any court records. He was thereupon asked, "Have you got any papers with you?" and he testified, "I have got my day-book that I used to keep." He was then asked whether he had known Sullivan for a good many years, to which he replied, "Quite a number of years." The plaintiff, in his bill of exceptions, states that he excepted to the admission of this testimony on the grounds on which he excepted to the questions asked Sullivan on cross-examination, and on the "further ground that this was an attempt to prejudice the court against the witness and to affect his credibility by testimony that the chief of police had private records in his day-book concerning the witness, in place of the proof of records required by law." It is a fair inference from the master's supplemental report, already quoted, that the purpose of these questions to the chief of police as to the records was an effort to get the court records which it appears from the master's supplemental report could not be found. Why the defendants asked the chief of police, when they found that the latter had no records, if he had known Sullivan for a good many years; and why he was allowed to answer that he had known him quite a number of years, — is not explained by the fact that the defendants were trying to get the records of the court. But in view of the fact that this testimony was not considered by the master or referred to in the argument and was treated as ruled out, and of the further fact that the witness had been convicted of an assault and committed to the house of correction, we do not think that he was prejudiced by its admission.

3. There is nothing before this Court showing in what the rulings of the master consisted which were excepted to by the defendants in the first, second, eighth, and ninth exceptions to the master's original report and in the first, second, and third excep-

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tions to his supplemental report.* If the master did make the rulings stated in the defendants' first, second, and eighth exceptions to the original report, we think that the rulings were right. If it be true (1) that the master made the statement set forth in the plaintiff's first exception to the supplemental report, and (2) that the defendants' counsel did address to the master, at the hearing under the order recommitting the cause to the master, the argument set forth in the second exception to that report, and (3) that the law underlying the suit was argued at that hearing and was considered by the master in making his supplemental report, the remedy of the plaintiff was to reargue

* The first exception to the original report was to the exclusion of evidence offered by the plaintiff to show that he had paid certain bills for taxes, repairs, and improvements on the property in question.

The second exception was to the admission in evidence of a portion of a letter written by the plaintiff to the defendant, and identified by the plaintiff, on cross-examination, as being in his handwriting.

The eighth exception was to the exclusion of evidence offered by the plaintiff to show that during the time when the defendant claimed to have been supporting the testator, the latter was trying to hire money of the defendant's husband for the purpose of supporting himself.

The ninth exception was on the ground that the master's findings were against the evidence and the weight of the evidence.

The first exception to the supplemental report was to the refusal of the master to insert therein "the following finding of fact, namely, that the master had stated to counsel, after filing his finding, that he considered John E. Sullivan a truthful witness, and all the other witnesses in the case truthful, and that the ground of his decision did not render it necessary to find any one guilty of untruthfulness, and that said statements were, as a matter of fact, true."

The second exception was to the master's refusal to insert in the supplemental report "the following finding of facts, namely, that the counsel for the defendants addressed to the master at the supplementary hearing an argument substantially as follows: That the answers of the witness Sullivan to the questions objected to (Exceptions 3, 4, 5, 6) were shuffling and stumbling answers, that there was nothing in the case to show that these offences had not been committed by the witness, that it was unfortunate that the records had been lost, but it was not the fault of the defendant, and that no injustice was done by throwing out the testimony of said Sullivan as worthless and unreliable."

The third exception was to the master's refusal "to insert in his report the following finding of fact, namely, that counsel argued the law underlying this suit in equity before the master, and submitted briefs of the same for his examination."

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the question of fact before the Superior Court on the report of the whole evidence; and this, it would seem from the ninth exception to the master's original report, the plaintiff has done. These exceptions were properly overruled.

4. For the reasons already stated, we are of opinion that it was proper for the master, in his supplemental report, to state how he treated the testimony of Sullivan on cross-examination and the testimony given by the chief of police in direct examination; this was the evidence previously spoken of by us, admitted *de bene*, which was not subsequently made good and which the plaintiff neglected to have stricken from the record. The fourth and fifth exceptions to the master's supplemental report were properly overruled.* Assertions of counsel are improperly added to each of these questions, and are not before this court.

The order of the Superior Court recommitting the cause to the master and the decree of that court overruling the plaintiff's exceptions to both reports of the master and dismissing the bill of complaint were correct.

Both appeals must be dismissed. The decree of the Superior Court confirming the report of the master and dismissing the bill must be affirmed.

Decree accordingly.

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* The fourth exception was to the master's refusal to strike from his report all statements therein as to his understanding and interpretation of the record.

The fifth exception was on the ground that the statement of the master in his report that he did not use or consider the evidence objected to and recited in exceptions numbered 3, 4, 5, 6, and 7, in preparing his report, was contrary to the record.

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CITY OF BOSTON *vs.* JOHN J. COON & another.

Suffolk. November 13, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

City — Joint Tortfeasors — Negligence — Action — Evidence.

A city, which has paid a judgment obtained against it in an action for injuries occasioned by a defect in a highway caused by acts and omissions for which a third person was answerable, may recover over against such person, although the city was negligent in failing to keep the way in a safe condition.

In an action by the city of Boston, a book was produced which purported on its title-page to be the "Revised Ordinances of 1895 of the City of Boston, as passed and approved December 14, 1885, with amendments thereto, passed and approved, to May 1, 1886, . . . published by order of the City Council." Upon the next page appeared the statement of the order for printing approved February 10, 1886, and at the end an attestation signed by the city clerk. *Held*, that no error appeared in the admission of the ordinance.

TORT, to recover the amount paid by the plaintiff upon a judgment obtained against it by one Blessington in an action for personal injuries caused by a defect in a highway. Trial in the Superior Court before *Bell*, J., who directed the jury to return a verdict for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

J. P. Sweeney, for the defendants.

S. M. Child, for the plaintiff.

HAMMOND, J. It is true, as claimed by the defendants, that the judgment in the suit of *Blessington* v. *Boston*, 153 Mass. 409, is conclusive against them only on three points, namely, that the highway was defective, that Blessington was in the exercise of due care, and that he suffered damages to the amount he recovered; and, if the evidence for the plaintiff had stopped there, it could not have been ruled as matter of law that the defendants were answerable over to the plaintiff.

But the evidence did not stop there. It further appeared as undisputed facts that the defendants were engaged in the construction of a building upon a lot of land abutting on Causeway Street in the plaintiff city, and under a permit issued by the city had excavated, for the purpose of connecting the building with a

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that fact was known to the defendants, and they could not relieve themselves from responsibility by leaving to other persons that part of the work of guarding the trench. Whether that part of the work be done by them, or by others with their knowledge, they are equally answerable.

It is well settled that the negligence of the city to fulfil its statute duty to keep the street in safe condition in a case like this is no bar to recovery. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24. *Holyoke* v. *Hadley Co.* 174 Mass. 424.

The judgment and the undisputed facts therefore show that Blessington was in the exercise of due care; that he was entitled to the damages he recovered; that the highway was defective, and that the defect was caused by acts and omissions for which the defendants were answerable; and that the negligence of the plaintiff is no bar to the action. This makes out a case for the plaintiff.

The admission of the ordinance was not error. The book produced on its title-page purported to be the "Revised Ordinances of 1885 of the City of Boston, as passed and approved December 14, 1885, with amendments thereto, passed and approved, to May 1, 1886. . . . Published by order of the City Council." Upon the next page appears the statement of the order for printing approved February 10, 1886. Taking the language of the title-page and of the vote and the attestation and considering them together, the court may have found that the attestation was intended to cover the whole book.

This was the only point argued concerning the admission of the ordinance.

Exceptions overruled.

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CHARLES SMITH *vs.* T. JOSEPH BEAUDRY.

Middlesex. November 13, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Master and Servant — Assumption of Risk — Action — Evidence.

A person, who has been employed in one die-shop for eleven months, during which he was engaged in grinding for one-third of the time, including, during a part of that time, "truing" the grindstone, and who has worked for the defendant for eight months, and during that time was employed in grinding dies and "truing" the grindstone whenever there was any grinding to be done, will be held to have assumed the risks arising from the position of the stone in relation to the rest which supported the "truing iron" and from the facts that there was a spring to the rest, that the straps of the groove in the top of the timbers were loose, that the threads of the nuts screwed on the tops of the bolts attached to the ends of the rest were worn, and that he was furnished with a gas pipe in place of a quarter-inch wire, or a roll, for use in "truing" the grindstone, and such a person cannot maintain an action against his employer for injuries sustained, while "truing" the stone, by having his hand carried with the point of the pipe down between the rest and the stone, though there is evidence that he is not an experienced grinder.

The facts, that when a person suing for an injury, who previously had been employed to work on a grindstone, was employed a second time, four months after his first employment terminated, he was employed not to grind but to help the finishers, and that it was not until three months later that he was set to grinding, do not take his previous experience out of the case; and the danger arising from the stone being swung over five inches above the beams on which the rest supporting the die travelled, is an obvious risk of his employment assumed by him.

In an action for personal injuries sustained while working on a certain machine where the above facts were disclosed, the question whether a person who formerly worked on the machine did or did not do something for the purpose of making it safer when using it, is immaterial and properly excluded.

Where the risk arising from the position of a machine is obvious and must be held to have been assumed by a workman using it, it is of no consequence that the business might have been conducted more safely by his employer.

TORT, for personal injuries sustained by the plaintiff while in the defendant's employ. Trial in the Superior Court, before *Hardy*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. J. Shaughnessy, for the plaintiff.

J. W. McDonald, for the defendant, was not called upon.

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LORING, J. In this action the plaintiff seeks to recover for losing three fingers of his left hand in "truing" a grindstone while in the defendant's employ. The defendant is a manufacturer of cutting-dies. Cutting-dies while in the process of being manufactured are ground down on a grindstone; the stone is thereby worn away and its surface becomes uneven. "Truing" a stone is grinding it down again until its surface becomes uniform and even.

The plaintiff worked for the defendant from May, 1895, to September, 1895, and from January, 1896, until he was hurt on May 9th of the same year. Before going to work for the defendant in 1895, the plaintiff had worked in die-shops at different times for two years and a half in all; for eleven months, ending April, 1895, (a month before he first went to work for the defendant,) the plaintiff had worked in the Brockton Die Company's shop, and had been employed there in grinding about one third of the time; and during the latter part of the time that he was grinding for that company, he did the work of "truing" the grindstone used by him.

When he first applied for work at the defendant's factory, he was told by the defendant's brother "that all they wanted a man for was to do grinding." He accepted the employment so offered and was set to work grinding the first day, and during the succeeding eight months in which he worked for the defendant whenever there was any grinding to be done he did part of it.

When the plaintiff re-entered the defendant's employ in January, 1896, he was employed helping the finishers on the floor, and continued in that work until April 11, when one Laverdreu, who was an experienced grinder and up to that time had been working on the grindstone which caused the accident in question, left the defendant's employ. The plaintiff was then set to work on this grindstone and continued on that work until one McDonald came. McDonald stayed but a week, and when he left, the plaintiff returned to this work.

The grindstone in question revolved on an axle set in metal boxes supported on heavy horizontal timbers. There was a rest to support the die, when held against the stone to be ground, which extended crosswise from one timber to the other and could be moved forward or back as the size of the die required. At

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each end of the rest was fixed a bolt, which ran in a groove in the top of the two timbers, which supported the grindstone. Each one of these grooves was strapped with a strip of iron. The top of each bolt attached to the ends of the rest terminated in a thread on which was screwed a nut. By screwing down the two nuts the rest was fastened firmly in the position in which the operator desired it to be and held there by the iron strapping on the grooves in which the bolts ran.

Grindstones are "trued" by a workman holding against the surface of the stone as it revolves an iron or wire in such a position that the elevations constituting the inequalities on the face of the stone come in contact with the iron or wire and are thereby worn down; the surface of the stone is thus made uniform. The iron or wire is held in position by holding it firmly on the rest which has been described.

In the case at bar, the plaintiff was "truing" a grindstone by holding against it a piece of iron gas pipe about five feet in length. The stone was revolving toward the plaintiff at the rate of not less than a hundred revolutions a minute. The injury was caused by the point of the pipe being carried down between the rest and the stone, together with the plaintiff's left hand, with which he was holding the "truing" iron in position. The stone was revolving so quickly that the plaintiff could not withdraw his hand and a fellow workman, attracted by his cries, ran to his aid and pulled his hand out, but not before he was so injured that he ultimately lost three fingers.

The plaintiff contends in the first place, that the defendant is liable for this injury because the metal boxes on which the axle of the stone rested were elevated five inches and a half above the timbers on which they were supported and on which the rest travelled back and forth. It appeared that the rest was only five-eighths of an inch thick; the iron pipe, therefore, came in contact with the stone three and seven-eighths inches below the centre of the stone; and it is contended that this intensified the danger of the iron being drawn under the stone by an inequality in its surface. It appeared that the metal boxes supporting the axle of the stone had been thus raised to enable the stone to clear the floor; the stone was originally from six to seven feet in diameter, and the top of the timbers was not quite three feet from the floor level.

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When the plaintiff was first employed, in 1895, he was employed to grind on this same grindstone, and no change had been made in it since that time. The fact testified to by the plaintiff that when he was employed the second time, four months after his first employment terminated, he was employed not to grind but to help the finishers, and that it was not until three months later that he was set to grinding, does not, as the plaintiff seems to contend, take his previous experience out of the case. Under these circumstances, the danger arising from the stone being swung something over five inches above the beams on which the rest travelled was obvious to a man of his experience, and was one of the risks assumed by him in undertaking the employment of grinding at that stone.

The second ground of liability relied on by the plaintiff is that the rest was defective. The defect consisted in the fact that the iron strappings of the grooves were loose and the threads of the bolts were worn, and, as a result, there was a spring to the rest when you bore down on it with a die or a "truing" iron. But the plaintiff testified that he noticed the spring which the rest had when he first used it, in 1895, and when he first began to use it again in April, 1896, and that the rest was in the same condition in which it was on the day of the accident during the three weeks next previous thereto, during which he had been grinding upon it. Moreover, in grinding dies, the rest is moved forward and back several times each day to adjust the distance between it and the stone to the particular die to be ground. If there was any defect in respect to the loose strappings or the worn threads, they were obvious to one in the position of the plaintiff, who was grinding on this stone for three weeks next before the accident. It is not clear on the plaintiff's testimony, whether there was any evidence that the accident happened from the rest having slipped. In testifying as to how the accident happened, the plaintiff stated that he was holding the pipe about five-eighths of an inch from the stone and — "the rod caught between the rest and the stone there and drew my hand up quickly and drew me right against it." He later testified that he told the defendant "that the rest must have slipped." We have assumed in his favor that the jury might have found that the accident was caused by the slipping of the rest.

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The third ground on which the plaintiff puts the defendant's liability is that the iron with which the defendant furnished him and which he was using at the time of the accident was not a proper instrument to use in "truing" a stone. It appeared that during the three weeks next before the accident the plaintiff had been using this iron gas pipe as occasion required in "truing" the stone. It also appeared that the defendant had usually provided iron wire one quarter of an inch in diameter for use in "truing" the grindstones; this wire came in bundles twelve feet in length and the workmen cut off strips four or five feet in length when they wished to use the wire on the stone. This quarter-inch wire had given out when the plaintiff went to work on this stone on April 11, or just before, and a new supply, which the defendant had sent for, had not come. And the defendant told the plaintiff "that he would order some, and that there was some gas pipe in the grinding-room, and that that was just as good until he got some quarter-inch wire." The gas pipe used was not a defective piece of pipe; if it be true that it is more dangerous than the quarter-inch wire, or the roll, that constitutes no ground of liability to one who voluntarily agrees to work with the machinery as he found it, including the use of the gas pipe in place of the wire or a roll, in "truing" the grindstone. The plaintiff relies on the defendant's statement to him that the gas pipe "was just as good until he got some quarter-inch wire," and contends that this gave him the right to assume that gas pipe was no more dangerous than quarter-inch wire was. The only difference between the two is that the wire would bend on encountering the inequality in the surface of the stone while the pipe would not bend; but this difference is obvious to a man of ordinary intelligence, and especially to one with the experience which the plaintiff had in working on and "truing" grindstones.

The plaintiff testified that he was not an "experienced grinder," and that he had never, either before or since the accident, let himself to work as an experienced grinder. That may be true. It may be true that in grinding dies the plaintiff had not had sufficient experience to be called an experienced grinder; but it is equally true that all the defects or conditions which, alone or together, caused the injury complained of in the

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case at bar, were obvious to a person of ordinary intelligence, and that a man who had been employed in one die-shop for eleven months, during which he had been grinding for one third of the time, including, during a part of that time, "truing" the grindstone, and who had worked for this defendant for eight months, and during that time was employed in grinding dies and "truing" the grindstone whenever there was any grinding to be done, cannot be heard to say that he did not assume the risks arising from the position of the stone in relation to the rest and the timbers, from the facts that there was a spring to the rest, that the straps of the groove were loose, and the threads of the nuts were worn, and that he was furnished with a gas pipe in place of the quarter-inch wire, or a roll, for use in "truing" the grindstone.

Laverdreu's testimony was properly excluded. Whether he did or did not put something under the rest to support it while he was using it in the defendant's employ, was immaterial. If Laverdreu had done so, it would have no tendency to prove or to disprove that the defendant was negligent or that the risk was not obvious, and the evidence was objectionable as tending to confuse the jury by raising an immaterial issue, involving the actions of third persons.

The plaintiff's exception to the ruling excluding the question which the plaintiff asked of one Patten, who qualified as an expert in grinding dies, must be overruled. The question asked was, "In your opinion, is it the proper and the general way to place the axle of a grindstone for grinding dies five or six inches above the top of the frame?" As we have held that the risk arising from this position of the grindstone was obvious, and for that reason was assumed by the plaintiff, it is of no consequence that the business might have been conducted more safely by his employer.

Exceptions overruled.

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MAX HARRINSON *vs.* GEORGE F. JELLY, trustee.

Suffolk. November 14, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Defective Stairway.

If, at the trial of an action for personal injuries occasioned to the plaintiff by a defective tread on the stairs of the defendant's building, the jury would be warranted in finding that the stairway was constructed for the use in common of the persons who worked in that part of the building where the plaintiff worked, and that the plaintiff had been so informed by the authority of the defendant; that at the time of the accident the plaintiff was rightfully passing over it and in the exercise of due care; that the stairway was not in existence at the time the plaintiff or his employer, who was a tenant of the defendant, first began to occupy the building, but was constructed several months afterwards and some weeks prior to the accident; that at the time of the accident it was in a defective condition, and that the accident was due to this condition; that it was a part of the building in which the tenants had only a right of passage in common, and that the control of it was retained by the defendant; that the defendant knew or ought to have known of the defective condition in time to repair, and that his failure to repair was negligence, the defendant may be held answerable.

TORT, for personal injuries. The plaintiff contended that on July 18, 1894, while descending the stairs in a building owned by the defendant he was precipitated to the floor below and sustained injuries by reason of the negligence of the defendant, his agents and servants, in permitting a tread on the stairs to become defective and unsafe. Trial in the Superior Court before *Gaskill*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. E. Cotter & B. H. Greenhood, for the plaintiff.

C. B. Southard, (*T. Parker* with him,) for the defendant.

HAMMOND, J. The evidence upon several vital points was conflicting, but it was the province of the jury to find where the truth lay, and without reciting it in detail we think the jury would have been warranted in finding that the stairway was constructed for the use in common of the persons who worked in that part of the building in which the plaintiff worked, and that

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the plaintiff had been so informed by the authority of the defendant; that at the time of the accident the plaintiff was rightfully passing over it and in the exercise of due care; that the stairway was not in existence at the time the plaintiff or Cohen his employer, who was a tenant of the defendant, first began to occupy the building, but was constructed several months afterwards and some weeks prior to the accident; that at the time of the accident it was in a defective condition, and that the accident was due to this condition; that it was a part of the building in which the tenants had only a right of passage in common, and that the control of it was retained by the defendant; that the defendant knew or ought to have known of the defective condition in time to repair, and that his failure to repair was negligence.

If such are the facts, then the case is well within the principles laid down in *Looney* v. *McLean*, 129 Mass. 33, and several subsequent similar cases, and the defendant may be held answerable.

Exceptions sustained.

CYNTHIA BATES *vs.* INHABITANTS OF SHARON.

Norfolk. November 15, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Assessment of Tax — Remedy — Petition for Abatement — Charitable Institution.

If a part of a tax assessed to a person upon his real estate is valid, although for the balance of the real estate assessed to him he is not taxable, the remedy is by petition for abatement and not by contract for money had and received.

A life tenant may be taxed as the owner of land under Pub. Sts. c. 11, § 13.

Real estate, occupied by a charitable institution for the purpose for which it was incorporated but owned by a third person, is not exempt from taxation.

CONTRACT for money had and received. Trial in the Superior Court before *Braley*, J., who reported the case for the consideration of this court in substance as follows.

On April 23, 1894, the plaintiff made and executed to the

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MAX HARRINSON *vs.* GEORGE F. JELLY, trustee.

Suffolk. November 14, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Defective Stairway.

If, at the trial of an action for personal injuries occasioned to the plaintiff by a defective tread on the stairs of the defendant's building, the jury would be warranted in finding that the stairway was constructed for the use in common of the persons who worked in that part of the building where the plaintiff worked, and that the plaintiff had been so informed by the authority of the defendant; that at the time of the accident the plaintiff was rightfully passing over it and in the exercise of due care; that the stairway was not in existence at the time the plaintiff or his employer, who was a tenant of the defendant, first began to occupy the building, but was constructed several months afterwards and some weeks prior to the accident; that at the time of the accident it was in a defective condition, and that the accident was due to this condition; that it was a part of the building in which the tenants had only a right of passage in common, and that the control of it was retained by the defendant; that the defendant knew or ought to have known of the defective condition in time to repair, and that his failure to repair was negligence, the defendant may be held answerable.

TORT, for personal injuries. The plaintiff contended that on July 18, 1894, while descending the stairs in a building owned by the defendant he was precipitated to the floor below and sustained injuries by reason of the negligence of the defendant, his agents and servants, in permitting a tread on the stairs to become defective and unsafe. Trial in the Superior Court before *Gaskill*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. E. Cotter & B. H. Greenhood, for the plaintiff.

C. B. Southard, (*T. Parker* with him,) for the defendant.

HAMMOND, J. The evidence upon several vital points was conflicting, but it was the province of the jury to find where the truth lay, and without reciting it in detail we think the [illegible] would have been warranted in finding that the stairway [illegible] structed for the use in common of the per[illegible] that part of the buildi[illegible] he [illegible]

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If such are the facts, then the case is well within the principle
shown in *Looney* v. *McLean*, 129 Mass. 33, and
so many similar cases, and the defendant may be held

Exceptions sustained.

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Ella Reed Home, a charitable corporation duly established under the laws of this Commonwealth, a deed of certain land with the buildings thereon situated in Sharon, which deed just preceding the habendum clause contained this language, — "being the same premises conveyed to me by Samuel B. Thing, lib. 655, fol. 319, and being hereby conveyed subject to the reservations herein contained or referred to. The said Cynthia Bates, as part of the consideration of this deed, reserves the right to use, occupy and improve the dwelling house on said premises free of any rent or charge for taxes or otherwise during the term of her natural life."

On the land on May 1, 1896, and on May 1, 1897, were a house, an unfinished barn, a new house and two hen-houses. On May 1, 1896, the assessors assessed the Ella Reed Home for the real estate and buildings. Subsequently, the taxes having been found to be invalid by reason of error in their assessment, on July 25, 1898, they were re-assessed to the plaintiff Cynthia Bates, "to whom said tax ought at first to have been assessed for her interest therein."

No application was made to the assessors by the plaintiff for an abatement of the taxes after they were assessed to her. On October 18, 1898, the plaintiff paid to the collector of taxes under written protest the sum of $227.59, being in full for taxes assessed her for the years 1896 and 1897 and costs and charges on the same. On May 1, 1896, and May 1, 1897, the plaintiff was in possession of and occupied the dwelling-house. She testified that she was there as president of the "Ella Reed Home." This fact at the time of the assessment of the taxes was not known to the assessors.

The plaintiff asked the judge to rule that under the language in the deed she did not take a life estate but simply had a "license or easement" to occupy the dwelling-house. Secondly, that if she had a life estate then she could be assessed only for her interest in the dwelling-house and not for the other buildings or land outside of it; and might under the evidence recover back in this action the excess paid.

The judge refused to rule as requested and found and ordered judgment for the defendant. If the first ruling requested should have been given, then the plaintiff was entitled to recover the

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sum of $227.59 with interest from the date of the writ. If the first ruling requested should not have been given and the second ruling requested should have been given, then the plaintiff was entitled to recover the sum of $112 with interest from the date of the writ; otherwise the judgment was to be affirmed.

J. W. Spaulding, for the plaintiff.

T. E. Grover, for the defendant.

LORING, J. By virtue of a reservation in the deed, the plaintiff had a life estate in the dwelling-house and the land belonging thereto, including at least the land under it. The provision in the reservation, that the grantor's right of occupation should be "free of any rent or charge for taxes or otherwise," may have the effect of enabling her to recover from the grantee any sum which she has to pay by way of taxes or otherwise while she occupies the estate; but it does not change the nature of the interest or estate reserved to her by the deed.

The taxes on the dwelling-house and land belonging to it were legally assessed to the plaintiff, who, as owner of a life estate in possession, was the owner thereof within Pub. Sts. c. 11, § 13.

It appears that the plaintiff was taxed, not only for the land in which she had a life estate but for the land owned by the Ella Reed Home; since a portion of the taxes were properly assessed to the plaintiff, her remedy, and her only remedy, was a petition for abatement of so much thereof as should have been assessed to the Home. *Kelley* v. *Barton*, 174 Mass. 396.

This conclusion is no way modified by the testimony of the plaintiff that she occupied the dwelling-house as president of the Ella Reed Home. It was not pretended that the plaintiff had released her life estate to the Ella Reed Home, which had the remainder in the dwelling-house, so as to make the Ella Reed Home the sole owner of the house. For that reason, the only effect that can be given to this testimony of the plaintiff is that the Ella Reed Home was occupying the dwelling-house by virtue of some permission or lease given to the Home by her as the legal owner thereof for her life. In such a case, the property does not become exempt from taxation as property of a charitable institution under Pub. Sts. c. 11, § 5, cl. 3. Real estate, occupied by a charitable institution for the purpose for which it was incor-

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porated but owned by a third person, is not exempt from taxation.

It follows that both rulings requested were rightly refused, and the entry must be *Judgment for the defendant affirmed.*

ELIZA A. ROBERTS *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 20, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Railroad — Due Care — Action — Evidence.

A woman, having good sight and hearing, and intending to take a train for another station, attempted in the daytime to cross from one side of a railroad station to the other, where she could take the train, from which station there was an unobstructed view of the track to the south for nearly half a mile, and was struck by an express train coming from the south which did not stop there, and injured. In an action for her injury, she testified that she looked up and down the track, but did not see or hear anything of the train which struck her. *Held*, that she failed to show that she was in the exercise of due care; and that the fact that the baggage master at the station told her that the train which she intended to take would be along in six minutes and to go across to the other side, did not justify her in assuming that she could cross safely.

In an action against a railroad corporation for injuries caused by being struck by a train while crossing the tracks from one side of a station to the other, in which the plaintiff testifies that he noticed a freight train standing on the tracks, it is within the discretion of the judge to exclude evidence as to the situation of freight cars at other times.

TORT, for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. Trial in the Superior Court, before *Hopkins*, J., who ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. E. Cotter & B. H. Greenhood, for the plaintiff.

C. F. Choate, Jr., for the defendant.

HAMMOND, J. The plaintiff was struck by a moving train as she was attempting to cross the tracks of the defendant at its

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station in Canton. She was intending to take the train for Readville, and was crossing the track to the place from which she could take the train. The question is whether she was in the exercise of due care. The train which struck her came from the south, was an express train, and did not stop at the station. From the platform from which the plaintiff started there is an unobstructed view of the track to the south, for a distance of nearly 2200 feet. It does not appear that the view was obstructed by any cars standing on other tracks at the time of the accident. It was daylight.

The plaintiff testified that upon being told to go across to the shelter she got up and went out of the waiting-room "towards the crossing, to go to the shelter and get across, and had one foot up when she was struck. She was crossing where passengers cross from the waiting-room. She did not cross right in front of the waiting-room door, but went up the platform a piece until she came to the crossing, and then went across. She walked straight across the crossing and stepped up one step to the shelter when she was struck. . . . When she came out of the waiting-room she walked over to where the crossing was. . . . She looked up and down but did not stop. . . . She noticed a long train of cars standing there, a freight train. . . . It was standing still." She did not know whether there was a locomotive attached to the freight train, nor the size and length of the train. "She was struck as she had one foot up." As to the train which struck her she testified that she did not notice anything about it, for she neither saw nor heard it. "She heard no whistle nor nothing." She further testified that she was sixty-seven years old, had good hearing, and nothing troubled her sight.

It is plain that the train which struck the plaintiff must have been clearly in sight as she stepped from the platform to cross the tracks. If she looked as she testified she did and did not see the train, she looked carelessly. If she looked and did see it, then she was attempting to cross the tracks in front of an approaching train, in full view, which was so near as to strike her before she got across. Such an act constitutes negligence unless there be some excuse for it.

But the plaintiff contends that she was invited to cross the

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track at that time, and was therefore justified in believing that she could safely cross. She says that she had a conversation with the assistant baggage-master, as to which she testified as follows: "I asked him what time the train would be along for Readville; he said in six minutes; to go across to the shelter. That is all he said and all I said."

These words of the baggage-master were a mere statement that the train would be along in six minutes, and must be taken from the other side; it was not an assurance that no other trains would pass until the plaintiff's train had come and gone. The train was not at the station, nor did the language relieve her from the duty of looking out for herself while crossing; and it was not understood by her as so relieving her, for she testifies that she did look up and down the track as though the responsibility of caring for herself rested upon her. In this respect the case differs materially from *Warren* v. *Fitchburg Railroad*, 8 Allen, 227, and similar cases cited by the plaintiff, where there was an implied assurance that there was no danger. It is impossible to see how the plaintiff could have been hurt if she had taken proper care of herself. She failed to show that she was in the exercise of due care.

We think the court might properly exclude the questions as to the situation of freight cars at other times. Such evidence, if admitted, might lead to inquiries as to collateral matters too remote and would be as likely to confuse and mislead the jury as to help them. As to the admission of evidence of this character, much must be left to the discretion of the trial court, and we cannot say as matter of law that in this case there was error in its exclusion.

Exceptions overruled.

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J. EUGENE COCHRANE *vs.* COMMONWEALTH.

Norfolk. December 15, 1899. — February 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Land Damages — Metropolitan Sewer — Expert — Evidence.

Where it is sought to prove the damage to property sustained by reason of a taking of the right to maintain a public sewer through it, if it appears that the land is by nature adapted for a site for dye-works or a print-mill, it is proper to allow evidence to be given as to its value for such purposes, though the land is not then used therefor, by a person who has been shown to be qualified to testify to such value by knowledge thereof derived from experience in that business; but testimony of this kind is to be admitted only when it is impossible otherwise to prove the value of the property in question.

At the trial of a petition to recover damages sustained by reason of a taking under the Metropolitan Sewer Act, St. 1895, c. 406, of the right to maintain a sewer through the petitioner's land, the petitioner's counsel said in the preliminary examination of a witness called as an expert on value, "What I am getting at here is the value of that supply of water in connection with the land — what is the value of that combination? I mean that value which is independent of the neighborhood which lies behind it. Its value for manufacturing purposes." After that eighteen questions were put to the witness and a discussion by counsel ensued before the judge ruled that the witness was qualified to testify to value; and the witness was then asked: "What is the value, the fair market value of this combination of land with the water power for the purposes of a printing business?" *Held*, that this question could not have been understood by the witness as having been qualified by the statement made by counsel in the preliminary examination.

PETITION to the Superior Court for a jury to assess the damages caused by the taking by the Board of Metropolitan Sewerage Commissioners, in behalf of the Commonwealth, under St. 1895, c. 406, of the right to maintain a sewer through the petitioner's land in Dedham. At the trial before *Fessenden*, J., the jury returned a verdict for the petitioner; and the respondent alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

J. M. Hallowell, Assistant Attorney General, for the Commonwealth.

M. Storey, for the petitioner.

LORING, J. The only exception presented in this case is that to the admission of the testimony of Kelsey L. Gilmore.

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The petition was brought to recover damages sustained by reason of a taking of the right to maintain a sewer through the land of the petitioner under the Metropolitan Sewer Act, St. 1895, c. 406. The land of the petitioner was situated on each side of a stream known as "Mother Brook," running through a channel originally constructed in 1640, and connecting the Charles and Neponset rivers, and through which a large amount of water ran from the Charles to the Neponset. The line of the Commonwealth's taking was more or less parallel with the line of the brook, and ran through the petitioner's land from one end of it to the other. The petitioner introduced evidence tending to show "that the plaintiff's property was valuable as a mill site, and that its value was largely derived from the fact that the relation between the stream and the adjoining land made it possible to send a large quantity of water by gravity through any building that might be erected on the premises; that the quantity and quality of the water supply made the site especially valuable for any manufacturing business where a large quantity of water was needed for cleansing or like purposes, such as bleaching, dyeing, and printing factory or a paper mill; that the value of a mill site for manufacturing purposes did not depend on the value of real estate for general purposes in the neighborhood, and that some of the most valuable mill sites were remote from any town. The petitioner called various expert witnesses, including manufacturers and mill engineers. The engineers testified to the injury caused to the property by the sewer taking arising from the additional difficulty and expense necessitated in the construction and location of mill buildings and the subsequent conduct of a manufacturing business."

Among other witnesses, the petitioner called Kelsey L. Gilmore, who testified that he lived in Lexington, Massachusetts, and had been engaged in the city of Somerville for forty-one years in the business of bleaching, dyeing, printing, and finishing cotton goods; that he bought the mill in which he was manufacturing in Somerville in 1878; that he never bought any other mill or mill site and never sold a mill or mill site; that he did not know of purchases or sales of mill sites; that he had examined the land of the petitioner in question with reference to forming an opinion as to its availability for a site for a mill

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for bleaching, dyeing, cleansing, and printing; that it was a very fine spot for a mill of that kind, on account of the supply of water which it had and the fact that the land of the petitioner was land lying below the head of the water, giving sufficient room for buildings, so that the water could flow through without pumping; that, from his experience, he knew what the value of a place of that kind is as a site for a mill for bleaching, dyeing, cleansing, and printing; that he had made no investigations in the neighborhood or elsewhere as to what the value of this site was for a mill of the kind described, or as to the value of this combination of land and water, but he had his own opinion about it from his own experience.

The court ruled: "If the witness states that he is familiar with the values of properties of this sort, of this kind, although for a particular purpose, I do not think his testimony incompetent. I think if he can say that he is familiar generally with the value of property of this kind, that he may testify." The witness was then asked: "Please state in your opinion what is the value of that combination there, that land and water there. What is the value, the fair market value of this combination of land here with the water power for the purposes of a printing business?" and answered, "I should think that with that amount of land, with that combination of land and water, that $50,000 would be a very low price for it." The defendant excepted to this question and answer.

The defendant is right in his contention that the damages must be measured by the injury to the fair market value of the plaintiff's land at the time of the taking; *Providence & Worcester Railroad* v. *Worcester*, 155 Mass. 35; *Moulton* v. *Newburyport Water Co.* 137 Mass. 163; and he is also right in his contention that where similar land is commonly bought and sold, the testimony of a witness, when found by the presiding justice to be competent to testify to its value, should ordinarily be limited on direct examination to giving a direct answer to the question, What is its fair market value, in view of all the purposes to which it is naturally adapted? *Manning* v. *Lowell*, 173 Mass. 100. The defendant is also right in his contention that ordinarily the proper way to qualify a witness as a witness to value of property is to show that he is familiar with sales of similar property and the prices paid therefor. *Lyman* v. *Boston*, 164 Mass. 99.

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But cases sometimes arise involving injury to property which is not commonly bought and sold; in a case involving injury to such property, to confine the owner of it to witnesses who show themselves qualified to testify to its value by their knowledge of sales of similar property, would be to deny the owner the right to prove what the true value of his property was. The market value of a piece of property is its value in view of all the purposes to which it is naturally adapted; that means that its market value if it is unoccupied is fixed by its value for the most valuable of those purposes. When an injury is done to property which is not commonly bought and sold, and a case arises in which the amount of that injury must be ascertained, it is proper to allow testimony to be given of its value for the special purpose for which it is used, and to allow that testimony to be given by persons who show themselves qualified to testify thereto from knowledge derived from experience in their own business in which they have dealt with similar property. The value of land actually used for manufacturing purposes is an illustration of property of this description, and testimony of persons to its value for manufacturing purposes was admitted in *Lowell* v. *County Commissioners*, 146 Mass. 403, though the persons testifying had no knowledge of purchases or sales of similar land and were qualified to testify as they did solely from knowledge derived from their experience as manufacturers. For similar cases, see *Warren* v. *Spencer Water Co.* 143 Mass. 155, and *Manning* v. *Lowell*, 173 Mass. 100.

And so when it was proved that the land in question in the case at bar is by nature adapted for use as a mill site for dye-works or for a print-mill, it was proper for the presiding justice in his discretion to allow testimony to be given as to its value for such purposes, by persons who have been shown to be qualified to testify thereto by knowledge thereof derived from experience in that business, though the land was not then used therefor. To exclude such evidence would be to deny to the owner the power of proving the real value of that property; no one can testify to that value by knowledge derived from the sale of lands in the neighborhood; they are not similar lands; nor by sales of mill sites for such purposes, for mill sites are not commonly bought and sold. Evidence of the value of the prop-

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erty as a mill site for such purposes, given by persons who have knowledge thereof derived from experience in that business, must be admitted from the necessity of the case.

But such testimony is objectionable as not being directly responsive to the question to be passed upon by the jury, namely, What is the injury to the fair market value of the property in view of all the purposes for which it is adapted by nature, including the specific purpose testified to, to which it has not in fact been devoted? By reason of its not being directly responsive, and by reason of the land not being in fact devoted to the specified purpose, such evidence raises many issues which, if it were possible, should not be raised. It is also objectionable because it may come as a surprise to the other party, who may have failed to anticipate that the case was an exceptional one, and who for that reason may not be prepared to meet any, but direct, evidence of the market value of the land as shown by purchases and sales in the neighborhood. For these reasons, the usual rule should be departed from and testimony of this kind admitted only when without it it is impossible to prove the value of the property in question.

The defendant also contends that the question which the witness answered was the value of the land as a mill site, independent of the locality, and that such a question is, at the least, inadmissible. But no such question was put to the witness, and there is no reason to suppose that the witness supposed he was answering such a question. Counsel for the petitioner did at one point in the preliminary examination of the witness say to him: "What I am getting at here is the value of that supply of water in connection with the land — what is the value of that combination? I mean that value which is independent of the neighborhood which lies behind it. Its value for manufacturing purposes." But after that question eighteen questions were put to the witness and a discussion by counsel ensued before the court ruled that the witness was qualified to testify to value and before the question as to the value of the petitioner's land stated above was put to him. Under these circumstances, we do not think that the question ultimately put could have been understood by the witness as having been qualified by this statement made by the counsel in the preliminary examination.

Exceptions overruled.

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CHARLES DOLPHIN *vs.* CHARLES PLUMLEY & others.

Hampden. January 17, 1900. — February 28, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Evidence — Trial.

In an action for personal injuries sustained by the plaintiff while employed in the defendant's mill, if the plaintiff testifies that a certain passageway was not a safe and convenient way for use, and the defendant introduces evidence to the contrary, it is not open to the plaintiff to contend that such evidence should be limited to those witnesses who were present while he was employed in the mill, if there is no evidence of any change in the general conditions and character of the way from the time the machinery was placed in the mill to the time of the plaintiff's injury, which occurred within a few months afterwards.

If evidence on a question is in a case without objection, the judge is not bound to limit its effect to a question which is a different issue.

A party is not entitled to single out some of several disputed facts in a case and ask an instruction to the jury upon them.

A request for a ruling based upon a fact of which there is no evidence, or assuming a fact which is in dispute, is rightly refused.

TORT, for personal injuries sustained by the plaintiff while employed by the defendants in their sawmill. After the former decision, reported 167 Mass. 167, the case was tried in the Superior Court before *Maynard*, J.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions, which appear in the opinion.

E. J. Tierney, for the plaintiff.

H. W. Ely & A. S. Kneil, for the defendants.

LATHROP, J. When this case was last before us, 167 Mass. 167, it was on the plaintiff's evidence alone. We were then of opinion that the case should have been submitted to the jury. Since then the case has been tried again; the jury returned a verdict for the defendants; and the case comes befores us on the plaintiff's exceptions. These disclose that on nearly every point the facts were in dispute.

According to the plaintiff's evidence he was injured while passing over a movable platform or apron, one purpose of which was to prevent splinters and chips thrown off by a circular saw from falling below and clogging the machinery; and while so

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crossing the apron it sank down a little, owing to its not having been properly replaced by one of the defendants, he fell, and his hand struck the saw. According to the defendants' evidence, the plaintiff did not step upon the apron, but was attempting to assist one of the defendants who was putting a belt upon a pulley, and in doing so his left hand came in contact with the saw; and it was no part of his duty to assist in putting on the belt.

In our former opinion it was said, speaking of the plaintiff's testimony: "To pass in such close proximity to the saw was obviously dangerous, and if other ways had been provided, we should hesitate to reverse the ruling below." Accordingly at the last trial there was evidence introduced that there were other ways; one inside the mill, between one of the side walls and the carriage which carried the log, and the other by going outside of the mill.

1. The first exception of the plaintiff relates to the admission of the testimony of certain witnesses for the defendants as to the inside passage. The plaintiff had testified that this was not at any time a safe and reasonably convenient passageway for him or any one else to use, because of its narrowness and other conditions; and that no one could go through there without being injured. The defendant introduced several witnesses who testified that they experienced no difficulty in going through this passageway, and that the passageway was used. Some of these witnesses were not present while the plaintiff was employed in the mill; and the plaintiff contends that the inquiry should have been limited to those who were there when the plaintiff was. The answer to this contention is the following statement in the bill of exceptions: "There was no evidence that there had been any change in the general conditions and character of said space from the time the mill machinery was placed in the building to and after the time of the plaintiff's injury." There was also evidence that the log on the carriage when the plaintiff was injured was not an unusually large one.

Nor could the evidence admitted be said to be too remote in point of time. The mill was constructed in the fall of 1895, and put in operation in the fall or early in December of that year. The plaintiff assisted in setting the carriage of the mill,

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worked there after it was in operation, and again from the second week in January to the time of his injury in March, 1896.

2. In respect to the platform by the saw, the plaintiff requested the judge to instruct the jury: "The testimony of witnesses that in their opinion this platform was not a proper means of passage, if of any bearing on the case, is merely on the question whether this platform was in fact used as a passageway."

This request seems to be based on a question and answer put to a witness, who was asked: "Is it proper within your knowledge and experience for these two screens and stepping over this mechanism, to be used as a passageway?" To this question the answer was: "No, sir, not unless a man wants to commit suicide." No objection or exception was taken to this question and answer at the time. The evidence being in the case without objection, we are of opinion that the judge was not bound to limit its effect to the question whether the platform was in fact used as a passageway, which was a different issue. See *Damon* v. *Carroll*, 163 Mass. 404.

3. Certain witnesses for the defendant were asked whether they had ever seen or known in similar mills the way over the screens to be used as a passageway, and answered in the negative. No objection was made or exception taken to the questions put to these witnesses or to their answers. The plaintiff requested the judge to instruct the jury as follows: "The testimony of witnesses that they have never known such a platform in other similar mills in general to be used as a passageway, if of any bearing on this case, is merely on the question whether this platform was in fact so used. If this platform was in fact so used, the plaintiff is not affected by what is or is not done in other mills." We are of opinion that this request was rightly refused for the reasons already stated.

4. The sixth request for instructions was as follows: "If this way across the platform or screen was used as a common passageway by the plaintiff and other workmen in the mill, to the knowledge of the defendant Plumley, and if the plaintiff by the use of due care could have walked across there without coming in contact with the saw, then if the plaintiff in the course of his duties attempted to walk across, and in so doing

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used due care, and was thrown on the saw by the negligent act of the defendant Plumley, the defendants are liable, even if it should be found that there were other ways of passage which might at that time have been possibly used." We are of opinion that this request was rightly refused. The question was not whether the plaintiff and other workmen used the passageway to the knowledge of Plumley, but whether this was held out by the defendants or by Plumley as a passageway, and this question was left to the jury. So also full instructions were given to the jury as to what would constitute due care on the plaintiff's part. Every fact stated in the request was in dispute, and there were other facts bearing upon the question of due care on the part of the plaintiff and of negligence on the part of the defendants, which are not referred to in the request. It does not seem to us that the plaintiff had the right to single out some of these disputed facts and ask an instruction upon them.

5. The last request was as follows: "If the carriage might start at any moment with a sudden jerk and travel so fast as to go out and back within fifteen seconds, the plaintiff was not bound to climb over the carriage to reach any other passageway, and was not bound to walk in any passageway in which projections of the carriage came so close to a perpendicular wall against which the plaintiff must walk as to make reasonable danger that the plaintiff would be struck by any of said projections, in the rapid movement of the carriage above spoken of." This request was rightly refused. There was no evidence that the carriage was liable to start at any moment with a sudden jerk. The evidence was that the carriage was at rest, and that it would not start until the belt was put on and a lever pressed down by the sawyer, who was then putting on the belt. There was also no evidence that the plaintiff was obliged to climb over the carriage. He could have gone round to the end of it and entered the passageway. The latter part of the request is also objectionable. It assumes that the projections of the carriage came so near to the wall that the plaintiff could not walk there with safety. This was one of the questions in dispute, as the defendants introduced evidence tending to show that there was a clear space outside of all projections, wide enough to afford a safe and convenient passageway. *Exceptions overruled.*

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JOHN McMANUS *vs.* PETER H. DONOHOE.

Middlesex. November 13, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Bond — Declaration — Pendency of Previous Action — Replevin — Proof of Breach — Application of Bond to Writ.

A declaration contained four counts, each of which alleged in the opening sentence that the defendant made to the plaintiff "a bond, a copy of which is hereto annexed marked 'A' in" a certain action of replevin The first and third counts each alleged also that, on a day named, a certain person as principal and the defendant as surety made and delivered to the plaintiff a bond, "a copy of which is hereto annexed marked 'A,' with condition," which had been broken; and the second and fourth counts each contained similar allegations, but described the copy of the bond annexed as marked "B." Annexed to the declaration were copies of two bonds precisely alike and marked respectively "A" and "B." *Held*, that the declaration contained counts on both bonds.

In an action on two bonds, the pendency of a previous action upon one of the bonds is pleadable only in abatement, and not having been so pleaded it is not error for the judge to refuse to require the plaintiff to elect which bond he will rely on, especially if the plaintiff states that he will consent to judgment for the defendant for costs in the previous action; and no ground appears in this case on which the plaintiff's right to recover could be limited to one bond if he proved breaches of both.

In an action on two bonds given in replevin suits, the parties to both of which are the same, and there being evidence tending to show that each bond was intended to apply to one particular writ, and that there had been a breach of each bond, the defendant is not entitled to a ruling that the plaintiff had failed to prove a breach of the bonds because he was unable to show, except by testimony varying the returns, to which replevin writ each bond related.

If, in an action on two bonds given in replevin suits, the returns on the replevin writs do not show to which writ each bond applies, it is open to the plaintiff to show what the fact is.

CONTRACT. The declaration, as amended, contained four counts, each of which alleged in the opening sentence that the defendant made to the plaintiff "a bond, a copy of which is hereto annexed marked 'A,' in the action of replevin hereinafter referred to." The first and third counts each alleged also that, on September 5, 1894, Catherine Riley, as principal and the defendant as one of the sureties "gave and entered into and delivered to the plaintiff a joint and several bond, a copy of which is hereto annexed marked 'A,' with condition," etc., and

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that the condition had been broken; and the second and fourth counts contained similar allegations, but described the copy of the bond annexed as marked "B." Annexed to the declaration were copies of two bonds precisely alike and marked respectively "A" and "B."

Trial in the Superior Court, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

On September 4, 1894, Michael Lally brought an action by writ returnable to the Police Court of Lowell, against John Lamb, and the plaintiff in the present action, who was a constable of Lowell, to whom the writ was delivered for service, made an attachment thereon of a horse and wagon.

On the same day Edward N. Wood and George C. Evans, copartners as E. N. Wood and Company, also brought an action, by writ also returnable to the same court, against Lamb, and the present plaintiff attached the same horse and wagon on the writ.

On the following day, Catherine Riley, claiming to be the owner of the horse and wagon, procured two replevin writs to be issued from that court for the purpose of regaining possession of the property from the present plaintiff. Both of these replevin writs were delivered for service to George F. Stiles, a deputy sheriff, who, before taking the property from the present plaintiff, took from Riley the two bonds in suit. The horse and wagon were then taken by Stiles, and delivered into the possession of Riley, or her agent.

It appeared in evidence that judgments were recovered by Lally and by E. N. Wood and Company against Lamb, which have never been satisfied in any part, and that the two replevin suits were both prosecuted to final judgment, the judgment in each being for a return of the property, with damages for its detention, which judgments have never been satisfied.

The plaintiff testified as a witness at the present trial, but, except only by directly contradicting the terms of both of his returns upon the two writs, in respect both to the order of priority of the two attachments of the horse and wagon, and also in respect to the time when the horse and wagon were taken from him under the writs of replevin, was unable to specify in any way which one of the two bonds applied to either of the two replevin writs.

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Stiles also testified as a witness, but, except, only by directly contradicting the terms of both of his returns upon the writs of replevin, in respect to the approval of the sureties upon the two bonds, and excepting further by directly contradicting the terms of the returns of the present plaintiff, in the respects as above mentioned, upon the two writs, was unable to specify in any way which one of the bonds applied to either of the two replevin writs. The defendant contended that the plaintiff could in no event recover upon more than one of the bonds; that in order to prevail upon that, he must show by legal proof a continuous relationship, the same at the time of trial as at the time of the taking on replevin, existing between one of the two bonds to the exclusion of the other, and one of two replevin writs to the exclusion of the other; and that legal proof of such relationship could not be made in contradiction of the returns of the officer upon the replevin writs, so far as the returns bore upon the subject of the relationship.

Upon the issue as to the relationship at the time of the original taking on replevin and at the time of the trial, between the bonds and writs, Stiles was asked, on cross-examination, to indicate which of the two bonds he accepted and relied upon when making the replevin upon each of the two writs, and thereupon he connected with one replevin writ a bond approved by himself as being the bond given and accepted in support of that particular writ; and with the other writ a bond approved by the attorney of the defendant named in the replevin writ as the one given and accepted in support of that writ.

The judge thereupon, in order to avoid confusion ordered the clerk to permanently attach to each writ as indicated by Stiles the bond which the latter designated as belonging with it. This the clerk then did, by pasting upon each of the replevin writs the bonds so associated by Stiles in his evidence. No objection was made by the defendant to such order of the court, or of the clerk's complying therewith, and the two writs, each with the bond so attached thereto by the clerk, were given to the jury without objection upon their retiring to consider their verdict.

There was no other evidence in the case to distinguish which of the two bonds applied to each writ of replevin. It was un-

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disputed that both of the bonds were executed by the defendant at the same time and before the same had been accepted by Stiles.

Upon the close of all the evidence, the defendant asked the judge to rule that the plaintiff, by reason of his inability to show to which of the replevin writs either of the bonds related except by testimony varying the terms of the returns upon each writ, had failed to prove such a breach of the conditions of the bonds as to entitle him to recover, and that therefore a verdict should be ordered for the defendant. The judge declined so to rule.

The trial of the case proceeded until the close of the evidence upon the assumption, so far as the defendant was concerned, that a recovery was sought upon one only of the bonds, and after the close of the evidence the defendant requested the judge to require the plaintiff to elect upon which of the replevin writs he relied; but upon the plaintiff informing the judge that he would consent to a judgment for costs for the defendant in another action between the same parties upon one of the bonds, which action was originally instituted at the same time as the action at bar, and was then pending in the Supreme Judicial Court, for the Commonwealth, upon appeal, the Judge declined to require the plaintiff so to elect.

The defendant requested the judge to instruct the jury as follows:

"The plaintiff is bound in this action by the returns of himself, and the deputy sheriff, upon the two writs of replevin, and upon the two earlier writs under which the property in question was attached, and, unless it affirmatively appears from the several returns, independent of extraneous evidence, to which particular one of the two replevin writs each of the two bonds relate, the verdict must be for the defendant." The judge declined to give such instruction.

The jury returned a verdict for the plaintiff for the penal sum of both bonds; and the defendant alleged exceptions.

N. D. Pratt, for the defendant.

J. S. Patton, (*C. Cowley* with him,) for the plaintiff.

MORTON, J. As we construe the amended declaration, to the allowance of which no exception or objection appears to have

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been taken, it contained counts on both bonds, and though the defendant may have supposed that bond A was the only one in suit, the legal effect of the declaration was otherwise. There is nothing to show that the defendant was misled at the trial by anything that the plaintiff said or did, even supposing that if he had been he could avail of it here for the first time. The pendency of the previous action was pleadable only in abatement, (*Mattel* v. *Conant*, 156 Mass. 418,) and not having been so pleaded, there was no error on the part of the court in refusing to require the plaintiff to elect which bond he would rely on, especially in view of the plaintiff's statement that he would consent to judgment for the defendant for costs in the previous action.

We see no ground on which the plaintiff's right to recover could be limited to one bond if he proved breaches of both. *Morse* v. *Hodsdon*, 5 Mass. 314, 317. The amount of the damages is another matter.

At the trial evidence was introduced without objection (whether by the plaintiff or the defendant does not appear) tending to contradict the returns on the writ of attachment and writs of replevin and to show that each bond related to a different replevin writ from that indicated by the return thereon. The defendant asked the court to rule at the close of all the evidence that the plaintiff had failed prove a breach of the bonds because he was unable to show except by testimony varying the returns to which replevin writ each bond related. He also asked the court to instruct the jury that unless it appeared affirmatively from the returns on the writs of replevin and attachment "independent of extraneous evidence, to which particular one of the two replevin writs each of the two bonds relate" the plaintiff could not recover. The court refused, and we think rightly, to give the ruling and instruction asked for.

Both bonds were declared on, and the parties to both were the same. There was evidence tending to show that each bond was intended to apply to one particular writ, and that there had been a breach of each bond. Even if the jury had been unable to determine the precise relation of the bonds to the writs, that fact would have constituted no valid objection to a recovery by the plaintiff since the defendant could not have been harmed

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by their inability to do so. But the returns themselves afforded evidence tending to show which bond applied to each writ and were before the jury. The ruling asked for assumed that the plaintiff was unable to show the relation except by testimony contradicting the returns and was objectionable, therefore, on that ground also.

As to the instruction requested it is enough to say that if the returns on the replevin writs did not show to which writ each bond applied it was open to the plaintiff to show what the fact was. *Hovey* v. *Lovell*, 9 Pick. 68. *Townsend* v. *Newell*, 14 Pick. 332. *Commonwealth* v. *McCue*, 121 Mass. 358. *Garity* v. *Giyie*, 130 Mass. 184. There is no rule of law which requires that it should have affirmatively appeared in the returns to which writ each of the bonds related. It was sufficient if it appeared that a bond had been taken in connection with each writ as required by statute. *Exceptions overruled.*

CATHERINE B. O'NEIL *vs.* H. A. HANSCOM & another.
ELEANOR MALONEY *vs.* SAME.
SAME *vs.* CITY OF CAMBRIDGE.
CATHERINE B. O'NEIL *vs.* SAME.

Middlesex. November 14, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Due Care — Negligence — Law and Fact — Evidence — Exceptions.

If the evidence in an action for personal injuries is conflicting on the questions of the plaintiff's due care and the defendant's negligence, the judge rightly refuses to take the case from the jury.

In an action for personal injuries, a witness, who has been asked what he observed about the plaintiff's condition, how she looked and acted, and how she had appeared since the accident, properly is allowed to testify that he had observed a very sick woman, that she looked like a broken invalid and a very nervous woman, utterly unable to do anything, and that she appeared incapable of talking consecutively.

Although there are around and at or near a trench in a street sufficient lights, horses, and barriers to warn a traveller of danger, and he sees them, but does not heed them, it cannot be said, as matter of law, that he thereby assumes

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the risk of falling into the trench, of the existence of which he is or may be ignorant.

No exception lies to the refusal to give instructions in the language requested, if they are sufficiently covered by the instructions given.

FOUR ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs respectively by falling into a trench, through the alleged negligence of the defendants. At the trial of the cases together in the Superior Court, before *Bell*, J., the jury returned a verdict for the plaintiff in each case; and the defendants alleged exceptions, which appear in the opinion.

G. A. A. Pevey & G. W. Buck, for the defendants.

A. J. Daly, for the plaintiffs.

MORTON, J. These are actions to recover for personal injuries sustained by the plaintiffs by falling into a trench in Massachusetts Avenue in the city of Cambridge. At the trial the evidence was very conflicting on the questions of the due care of the plaintiffs and the negligence of the defendants. There was evidence for the plaintiffs tending to show that the trench was not properly lighted or guarded and that they exercised due care in walking down the car track as they did. On the other hand there was testimony on the part of the defendants tending to show that the trench was abundantly lighted and guarded and that the plaintiffs could not have fallen into it if they had paid due heed to where they were going and to the lights and guards that were placed to warn travellers and to other warnings alleged to have been given to them. In view of the state of the evidence we do not see how the cases could have been taken from the jury and we think that the court rightly refused to grant the request to that effect made by the defendants.

We also think that the testimony of Mrs. Wentworth was properly admitted. She was asked what she observed about her (plaintiff O'Neil's) condition, how she looked and acted, and how she had appeared since the accident. Her answers that she had observed a very sick woman, that she looked like a broken invalid and a very nervous woman utterly unable to do anything, and that she appeared incapable of talking consecutively, stated facts which are matters of common speech and observation in regard to the condition of sick or injured persons,

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and though involving to some extent conclusions and opinions were not thereby rendered incompetent. *Commonwealth* v. *Dorsey*, 103 Mass. 412. *Parker* v. *Boston & Hingham Steamboat Co.* 109 Mass. 449. *Nash* v. *Hunt*, 116 Mass. 237. *Commonwealth* v. *Sturtivant*, 117 Mass. 122.

The defendants further contend that requests 6, 7, 16 and 17 asked for by them should have been given.* We see no error in the refusal to give them. Assuming according to the sixth request that there were around and at or near the trench sufficient lights, horses and barriers to warn the plaintiffs of danger, and the plaintiffs saw them, and did not heed them, it cannot be said as matter of law that they thereby assumed the risk of falling into a trench of whose existence so far as appears from the instruction requested they were or might have been ignorant. So far as there were matters contained in the other requests to which the defendants were entitled to have the attention of the jury directed, it seems to us that they were sufficiently covered by the instructions that were given.

Exceptions overruled.

* These requests for instructions were as follows: "6. If upon the evidence you are satisfied that there existed around, at, or near the trench lights, horses, and barriers in sufficient numbers to warn the plaintiffs of danger, and the plaintiffs saw them, but did not heed them, they assumed the risk of being injured and so cannot recover. 7. If upon the evidence you are satisfied that there were at the time of the accident, at or near to the trench where the accident happened, lights, lanterns, red or white, or either, barriers, and horses in sufficient number to put a reasonably diligent man upon his guard and warn him of the open trench and danger, and the plaintiffs did not see them, there being no evidence that their eyesight was defective, they were negligent in not seeing and heeding them. 16. A pile of dirt in a street in Cambridge is an indication, according to common experience, that there may be an excavation near it from which earth was dug. 17. Piles of earth, such as described by the evidence in this case, with pipes, barrels, lanterns, and horses about them, are an indication, according to common experience, that there may be an excavation or trench at or near said pile of dirt, or enough to warn a reasonably diligent man of the existence of said excavation or trench."

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ELIZABETH A. PRESCOTT *vs.* WILLIAM F. WEBSTER.

Suffolk. November 15, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Liability of Husband for Board furnished his Wife — Instructions.

If, in an action for board furnished to the defendant's wife, it appears that she was homeless, had been deserted by the defendant without justifiable cause, had no personal property, and had such an interest in real estate that she could not realize upon it so as to relieve her distress, a ruling that "the wife having property of her own the husband was not liable for necessaries furnished to her without his knowledge or assent by one who knew the wife's circumstances" is rightly refused, and a finding for the plaintiff is correct.

CONTRACT, for board furnished the defendant's wife. Trial in the Superior Court, without a jury, before *Bishop*, J., who refused to give a ruling requested by the defendant and found for the plaintiff; and the defendant alleged exceptions. If the ruling and refusal to rule were erroneous the finding was to be set aside and judgment entered for the defendant; otherwise, judgment on the finding.

W. C. Wait, for the defendant.

No counsel appeared for the plaintiff.

HAMMOND, J. The general rule is that when the wife lives apart from her husband without any fault on her part, the husband is liable for her adequate maintenance in her station in life, and in case he fails in that duty, he is liable to any third person for necessaries furnished to the wife; *Liddlow* v. *Wilmot*, 2 Stark. 86; Chit. Con. (13th ed.) 238 *et seq.*; *Mayhew* v. *Thayer*, 8 Gray, 172; *Hall* v. *Weir*, 1 Allen, 261, and cases there cited; and we know of nothing in our statutes respecting the relations of husband and wife to each other, and to the property of each other, which should change this rule so far as material to this case. But the husband is not so liable if the wife has property adequate to her support. He is liable only upon ground of reasonable necessity. Where, however, the wife has some means, the question as to whether in any particular case her means are such as to relieve the husband from

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liability for the articles furnished is generally a question of fact and not of law. *Liddlow* v. *Wilmot*, 2 Stark. 86. *Thorpe* v. *Shapleigh*, 67 Maine, 235. *Hall* v. *Weir*, *ubi supra*.

In this case the defendant was thirty-two years of age, and his wife much older, and he had left her without justifiable cause. It appears that at that time she was the owner of an equity of redemption of the value of $2,000 in a house in Haverhill, the rents of which were applied to payment of the interest on the mortgage and taxes, and were, during the separation, no more than sufficient for that purpose, and that she had no other property; that upon her husband's desertion she lived alone for a time and afterwards went to live with her daughter, the plaintiff, upon the credit of the husband, at the rate of $3.50 a week, which was a reasonable rate. It does not appear what property the defendant had, or what his station in life was.

The court declined to rule that "the wife having property of her own the husband was not liable for necessaries furnished to her without his knowledge or assent by one who knew the wife's circumstances," and having so declined, found for the plaintiff.

The wife was homeless. She had no personal property, nor does it appear that her interest in real estate was such that she could realize upon it so as to relieve her distress.

We cannot say, as matter of law, under the circumstances, that the ruling requested should have been given. Whether the wife's necessity was so great as to make the defendant liable was a question of fact and not of law.

Judgment for the plaintiff.

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CHARLES J. BUTTLE *vs.* GEORGE G. PAGE BOX COMPANY.

Middlesex. November 16, 17, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Master and Servant — Dangerous Machine — Action.

A boy eighteen years old, who had been at work several days, was told to oil, while in motion, a band saw about two and one-half inches in width, having teeth on one edge. He knew that he was to pour the oil into a cup which was on top of one of the feed rolls nearest the saw and a little on one side of the plane in which the saw was moving, about twenty inches above the table and within easy reach of a person standing on the floor. Under the table was another cup, into which he had poured oil several times for the purpose of oiling the saw. When he received the order he was facing the plain edge of the saw. Without passing in front of the saw, as he might have done, he took up the can with his left hand, the saw being between him and the cup, and in carrying the can towards the cup his hand came in contact with the teeth of the saw, and he was injured. Everything was in plain sight, and he knew that the saw was in rapid motion, and that if his hand came in contact with it he would be hurt. *Held*, that he could not maintain an action under the employers' liability act, St. 1887, c. 270, for his injury.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries sustained by the plaintiff, who was eighteen years old, through the alleged negligence of the defendant, by having his hand come in contact with the teeth of a band saw, on which he had been at work several days. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

E. R. Champlin, (*G. L. Wilson* with him,) for the defendant.

H. J. Edwards, (*R. E. Harding* with him,) for the plaintiff.

HAMMOND, J. The general instruction upon which this case was submitted to the jury was as follows: "If the plaintiff was ordered by Gillis to oil the band-saw machine while it was in motion, and in obedience to such order attempted to oil the machine, and the work of oiling the machine while in motion was more dangerous than the work he had been employed to do and had done up to the time of the giving of such order, and the plaintiff, by reason of his youth or inexperience, was incapable

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of appreciating the increased danger to which he exposed himself, or of doing the work safely without instruction or cautions which he did not receive, he may maintain this action, provided the jury find that there was no negligence on his part." Assuming this to be a correct statement of the law, the main question is, whether, under that instruction, the evidence warranted a verdict for the plaintiff.

Upon the evidence, were the jury warranted in finding that the plaintiff, by reason of his youth or inexperience, was incapable of appreciating the increased danger to which he exposed himself in the attempt to oil the saw, or of doing that work safely without instructions or cautions which he did not receive? What he was told to do was to oil the saw while in motion. It was a band saw about two and one half inches in width, having teeth on one edge. He was not to touch the saw or to place the oil directly upon it, and he knew that and did not attempt to do either. He knew what to do with the oil. He was to pour it into a little cup which was on top of one of the feed rolls nearest the saw. Under the table was another cup prepared for the same purpose, into which the plaintiff testified that he had himself poured oil several times before the accident, for the purpose of oiling the saw. He knew how to pour oil into such a cup from such an oil can. The pair of feed rolls, upon one of which was the cup into which the plaintiff was attempting to pour the oil at the time of the accident, stood one on each side of the saw, in front of the teeth, and so close that a straight line drawn across from one to the other would clear the teeth by only three quarters of an inch. The cup was of course a little on one side of the plane in which the saw was moving, about twenty inches above the table and within easy reach of a person standing upon the floor. The saw was in rapid motion, but there was no vibration, the plane of the motion remaining the same. At the time the plaintiff received the order, the oil can was near him upon the table, and he was standing at the table behind the saw, that is, he was facing the plain edge of the saw. To comply with the order he had simply to take the oil can, move to a convenient spot, and pour oil from it into the cup. He knew it, and that was what he intended to do. Without passing in front of the saw, as he might have done, he took up the can with his left

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hand, the saw being between him and the cup, and in carrying the can towards the cup his hand, before the can reached the cup, came in contact with the teeth of the saw. There was no change in the position either of the saw or the cup, or of anything else except the can and his hand and body. Everything was in plain sight, he saw everything, and he knew what the saw was, knew that it had sharp edges upon the side nearest the cup, and that it was in rapid motion. He knew that if his hand came in contact with the saw he would be hurt, and he knew that in oiling the saw above the table he must be careful not to let his hand touch the saw. He had seen the saw for several days and knew how it looked when in motion and when at rest, and he had been at work on a circular saw several days before he went to the band saw. There was no direct testimony to show that he was not of average intelligence.

While he may not have known very much about the saw and the machinery by which it was moved, it seems to us that, upon the evidence, he knew enough for the act he was requested to perform, and that the jury were not warranted in finding that he was incapable of appreciating the increased danger to which he exposed himself or of doing the work safely without instructions or cautions which he did not receive. The defendant was entitled to a verdict in its favor. *Exceptions sustained.*

CHARLES J. LORD *vs.* GEORGE T. HARTFORD.

Suffolk. November 17, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Pledge — Purchase by Pledgee at Foreclosure Sale — Right of Action by Pledgor.

A pledgee is precluded from buying at a foreclosure sale of the property pledged, whether the sale is held under Pub. Sts. c. 192, §§ 10, 11, or under the contract of pledge, or otherwise.

The doctrine that where a pledgor seeks to follow the pledged property bought in by the pledgee and to assert title to it in the hands of a third person the sale

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will be treated as voidable only, has no application to an action by the pledgor to recover from the pledgee damages caused by a wrongful sale of the property pledged.

CONTRACT, to recover the value of a mortgage given by Albert H. Greenough upon certain real estate in Boston, to secure the payment of a promissory note for $1,300, with counts in tort for the conversion of the same. Trial in the Superior Court, without a jury, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff introduced in evidence a certified copy of the mortgage, and an assignment thereof from the plaintiff, in the name of Anna B. Pinkham, to the defendant, absolute in form, and also, against the objection of the defendant, was allowed to introduce in evidence a promissory note dated March 26, 1898, for the sum of $450, payable to the defendant three months after date, with interest at one per cent per month, and signed by the plaintiff, and also the following paper, dated March 26, 1898, and signed by the defendant: "Received of Charles J. Lord an assignment of $1,300 mortgage from Anna B. Pinkham as collateral security, on a loan of four hundred and fifty ($450) dollars for three months, with interest at one per cent a month, which mortgage I agree to deliver to the order of the said Lord upon the payment to me of the said $450 and interest as above." To the admission of these last mentioned papers the defendant excepted.

The plaintiff also showed that the mortgage in question was subject to a first mortgage to secure $9,500, and a second mortgage to secure $2,000 on the same premises, both of which were outstanding, but on which the interest had been paid.

The plaintiff testified in substance that on January 6, 1899, he tendered the defendant $500 and said to him, "I have come for the papers and note"; and that the defendant said, "I have sold it, and will have nothing to do about it. It was bought in by me and I have sold it." On cross-examination, the plaintiff testified in substance that he had not paid anything upon the note; that the defendant had demanded payment thereof; and that on September 17, 1898, he had a written notice served on him that the collateral security given to secure the payment of his note for $450 would be sold on November 19, 1898, at public

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auction, for the purpose of foreclosing the pledge, signed by the defendant. The plaintiff testified further that he was present at the time and place of the sale of the mortgage, and produced the notice of the pendency of a bill in equity brought by him and another against the defendant in the Superior Court, and that an injunction had been ordered to issue, and gave the same to the defendant's attorneys; that thereupon the sale was adjourned one week to the same hour and place; that the conditions upon which the injunction was to issue not having been complied with by him, and the injunction not having been issued, he was present at such time and place, and the mortgage was sold by an auctioneer and was bid off by Mr. Gove; and that he did not bid himself, and did not offer to pay the $450 note and interest, but objected to the sale, and contended both then and afterwards that it was illegal.

Isaac S. Cohen, a witness called by the plaintiff, testified to the tender of $500 on January 6, 1899, and that the defendant declined it, saying he had sold the mortgage. The plaintiff also introduced in evidence, against the objection of the defendant, an assignment of the mortgage and note by the defendant to one Reed, dated December 9, 1898. The plaintiff called as a witness Howard E. Cook, who testified that he negotiated the loan from the defendant to the plaintiff of the $450, and wrote the note and the assignment of the mortgage to the defendant, and the agreement from the defendant to the plaintiff; and that he was a dealer in real estate and acquainted with values and with the value of the property covered by this mortgage; and, against the objection and exception of the defendant, was permitted to give his opinion of the value of the mortgaged property; and the plaintiff was also allowed, against the objection of the defendant, to testify that he had sold the mortgaged property for $15,000.

The defendant called as a witness Horace D. Gove, who testified that he, as attorney for the defendant, made the notice of the foreclosure sale testified to by the plaintiff, and served the same on the plaintiff on September 17, 1898, and left the same in the city clerk's office, in Boston, on September 19, for record; that on November 19, 1898, the day of the sale, and just before twelve o'clock, noon, he received the notice of the pendency of

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the bill in equity above mentioned; that thereupon he had the sale adjourned one week, at which time and place, no injunction having been served on the defendant and no further notice having been given of the pendency of the suit in equity, and no payment of the sum due having been made, he had the sale proceeded with, and the mortgage was put up at auction by a duly licensed auctioneer, and bids called for; and that, after several bids were made, it was struck off to the witness, he being the highest bidder; that he bid it in for the defendant; and that the plaintiff was present at the sale, and made no protest or objection and did not bid.

The defendant testified that when he loaned the $450 on the mortgage he was told by Cook, the broker who negotiated the loan for the plaintiff, that there was only a prior mortgage of $9,500 on the premises, but that afterwards he learned of the second mortgage of $2,000; that, had he known of it, he should not have made the loan; that he was acquainted with the values of real estate in that vicinity; and that the value of that property did not exceed $12,000, and the mortgage would have little or no market value.

The defendant requested the judge to rule as follows: "1. The assignment of the $1,300 mortgage and note being an absolute assignment, and the plaintiff taking back the agreement for defeasance, made the transaction a mortgage of the $1,300 mortgage and note; and the only remedy to the plaintiff under such a mortgage is a bill in equity to redeem, and no action of law can lie. 2. The notice to the mortgagor of the $1,300 mortgage, and demand for the payment of the same having been made, and no payment being made in sixty days from the date of the recording thereof, which was September 19, would foreclose such mortgage, it being a mortgage of personal property, and on November 19, 1898, the plaintiff's right to redeem the first mortgage had expired. 3. There being no provision in the statute prohibiting the purchase of the mortgaged or pledged property upon a sale for foreclosure by the mortgagee or pledgee, or any attorney or agent for him, this sale is not invalid unless fraud in the sale or manner of notice is proved, and the purchase by Mr. Gove for the defendant in this case is valid and forecloses the mortgage or pledge. 4. The tender,

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if any was made in this case, being more than ninety days after the notice of sale, was an unreasonable delay, and the plaintiff is estopped from setting up any such tender. 5. Upon all the evidence in the case this action cannot be maintained."

The judge declined so to rule; ruled that the transaction constituted a pledge; and found for the plaintiff. The defendant alleged exceptions.

R. Lund, for the defendant.

E. Lowe, for the plaintiff.

LORING, J. The defendant's first contention is that Pub. Sts. c. 192, §§ 10, 11, had not been enacted when *Middlesex Bank* v. *Minot*, 4 Met. 325, was decided, and that the rule applied in that case does not apply to a sale made under the provisions of the subsequent act. It is true that Pub. Sts. c. 192, §§ 10, 11, had not been enacted in 1842, when *Middlesex Bank* v. *Minot* was decided; those provisions were originally enacted in 1859; Gen. Sts. c. 151, §§ 9, 10; but a pledgee is just as much precluded from buying in at a foreclosure sale under the act, as in a foreclosure sale held under the contract of pledge, or otherwise. A pledgee is precluded from buying the property pledged at a foreclosure sale, on the ground that his duty to the pledgor is inconsistent with his interest as a purchaser. His duty to the pledgor is to get the highest price which he can reasonably get for the property pledged, and his interest as a purchaser would be to buy the property as cheaply as he could. The conflict between his duty and his interest is the same, whether he sells under the statute or otherwise.

The other contention of the defendant is also not well founded. It is true that in an action, in which the plaintiff pledgor seeks to follow the property bought in by the pledgee and to assert title to it in the hands of a third person, it has been held that the purchase is voidable, not void; *Blood* v. *Hayman*, 13 Met. 231; *Burns* v. *Thayer*, 115 Mass. 89; and that the right to avoid the sale, if not exercised within a reasonable time, is lost. *Learned* v. *Foster*, 117 Mass. 365. These cases are based upon the regard which the law has for the intervening rights of the purchaser for value, without notice or knowledge of any defect in the exercise by the pledgee or mortgagee of the power of sale given him; *Silva* v. *Turner*,

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166 Mass. 407; *Rogers* v. *Barnes*, 169 Mass. 179, 183, 184; and have no application to the action at law by the pledgor to recover from the pledgee damages caused by a wrongful sale of the property pledged. *Middlesex Bank* v. *Minot*, 4 Met. 325. *Fletcher* v. *Dickinson*, 7 Allen, 23.

Exceptions overruled.

COMMONWEALTH *vs.* ALEXANDER D. REID.
SAME *vs.* SAME.

Suffolk. November 20, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Unlawful Sale of Ice — Complaint — Formal Defects — "Provisions" — Statute — Peddler — Instructions — City Ordinance.

It is too late to object in the Superior Court that a complaint filed originally in an inferior court is insufficient in form.

A complaint, alleging that, at a time and place named, the defendant "did go from place to place carrying and exposing for sale certain goods, wares, and merchandise, to wit, ice, without then and there having a license from the Secretary of said Commonwealth so to do," describes in substance, if not in form, a violation of Pub. Sts. c. 68, § 16, and not a violation of St. 1890, c. 448.

Ice is not included in the term "provisions," within Pub. Sts. c. 68, § 1, permitting any person to go from place to place in the same town exposing for sale and selling provisions.

Driving a load of ice through the streets of a city, calling out "Ice," and twice selling ice to a person standing in the street who then and there paid for the same, is sufficient evidence that the one doing these acts was going from place to place carrying and exposing merchandise for sale; and the fact that he did this as an employee of a solvent corporation which not only sent out a cart to peddle ice, but also delivered ice to persons who had previously ordered the same, and the further fact that the occupants of the house to which the purchaser above mentioned had directed the ice bought by him on the street to be delivered, were among the customers in the list handed by the corporation to the employee, do not make his actions any the less a violation of Pub. Sts. c. 68, § 16.

In view of the fact that the defendant in a complaint for unlawfully carrying and exposing ice for sale was seen driving along a street and calling out "Ice," sales made by him on the street are evidence on which the jury are warranted in finding that selling ice from a wagon driven by him was within the general scope of his business.

A request for a ruling based upon a fact of which there is no evidence is rightly refused.

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The fact that the defendant in a complaint for unlawfully carrying and exposing ice for sale, some time after the sales shown in evidence were made, ceased to be employed by the corporation in whose employ he then was, shows that he was employed temporarily in the established business of that corporation, and not that, at the time in question, he was engaged in a temporary or transient business, within St. 1890, c. 448; and, if he were engaged temporarily in peddling ice for that corporation, he is guilty of a violation of Pub. Sts. c. 68, § 16.

Evidence that a person in the employ of a corporation drove through a street, calling out "Ice," and sold ice from the wagon to a person on the street who paid for the same, does not tend to prove that the former was an itinerant vendor, within St. 1890, c. 448, but tends to show that he was peddling ice for the corporation, which also conducted an established business in selling ice.

A complaint, alleging that, on a day named, at Boston, the defendant "did sell to the complainant," in a certain street, "a certain article, to wit, a piece of ice, said complainant being then and there on said street, and said defendant not then and there having a permit from the superintendent of streets of said city of Boston to sell as aforesaid," sufficiently describes a violation of Rev. Ord. of Boston of 1890, c. 43, § 35, within Pub. Sts. c. 218, § 17, providing that in such a case the by-law on which the complaint is founded need not be set forth.

TWO COMPLAINTS. The first complaint, under Pub. Sts. c. 68, § 16, alleged that the defendant, on July 21, 1898, at Boston, "did go from place to place carrying and exposing for sale certain goods, wares, and merchandise, to wit, ice, without then and there having a license from the Secretary of said Commonwealth so to do."

The second complaint, under Rev. Ord. of Boston, of 1890, c. 43, § 35, alleged that the defendant, on July 21, 1898, at Boston, "did sell to the complainant in West Second street, near E street, a certain article to wit: a piece of ice, said complainant being then and there on said street, and said defendant not then and there having a permit from the Superintendent of Streets of said City of Boston, to sell as aforesaid."

In the Superior Court, before the jury were empanelled, the defendant moved to quash the complaint in each case, for the following reasons: "1. No offence known to the law is plainly and substantially set forth in said complaint. 2. It does not plainly appear from said complaint whether the prosecution is under Pub. Sts. c. 68, or under St. 1890, c. 448."

These motions were overruled; and the defendant excepted.

The cases were tried together, before *Stevens*, J., who allowed a bill of exceptions, in substance as follows.

The evidence showed that on July 21, 1898, the defendant, then an employee of the Boston Ice Company, was driving one

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of that company's ice wagons along West Second Street in Boston. The complainant testified for the government, that as the wagon approached the place where he was standing, near the corner of West Second and E Streets, he heard the defendant shout "Ice, ice," several times, and saw the defendant deliver ice at several houses; that when the wagon reached that corner, the witness purchased a piece of ice and paid ten cents therefor to the defendant, and when the wagon had proceeded about half a block further, he bought another piece of ice of the defendant and paid him another ten cents therefor; that both pieces of ice were delivered by the direction of the witness at the house No. 301 West Second Street; and that before buying the second piece of ice, the witness told the defendant that his intention was to test the question whether the defendant could sell without a license, but that the latter did not know him, and the two had never seen each other before.

The defendant introduced evidence showing that the Boston Ice Company was a solvent corporation, established for many years, and continuously occupying business premises in Boston; that the custom of its business was at the beginning of the year to cause its solicitors to procure orders for the delivery of ice upon its routes; that such orders were transmitted to the office of the company, where lists of the houses at which ice was so ordered to be delivered were made up and given to the different drivers of its wagons; that the list of customers given by the company to the defendant included the occupants of the house No. 301 West Second Street, and of the houses adjoining it on each side; and that the ice delivered by the defendant was the property of the company, and all proceeds received therefor were transmitted to the office of the company. It appeared also that the defendant was for some months in the employ of the company, but had ceased to be in its employ after the sales in question.

The defendant requested the judge to instruct the jury in each case as follows:

"1. The government has not alleged and proved any offence under the law. 2. The government has not plainly set forth in the complaint the offence intended to be alleged; and

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whether it was intended to charge the defendant as a peddler or an itinerant vendor. 3. The offence and the penalty of selling as an itinerant vendor and of selling as a peddler being now different, the defendant cannot be convicted under this complaint, which fails to state which offence is intended to be alleged. 4. If the defendant was a selling agent in the usual course of business of a trader occupying a building for the sale of his goods, the complaint cannot be maintained. 5. There is no sufficient evidence that the defendant was a peddler to sustain a conviction as such under the Public Statutes. 6. If the defendant's occupation was a temporary or transient business, and any building was occupied for the sale of his goods, he cannot be convicted under these complaints. 7. The evidence tends to prove that the defendant was an 'itinerant vendor' within the definition in St. 1890, c. 448, § 1, and as to such itinerant vendors, Pub. Sts. c. 68, is repealed."

But the judge refused so to instruct the jury; and the defendant excepted.

The jury returned a verdict of guilty in each case; and the defendant alleged exceptions.

C. P. Sampson, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

LORING, J. In the first of these cases the defendant is complained of for a violation of Pub. Sts. c. 68, § 16, in selling ice in a street in Boston without license from the Secretary of the Commonwealth.

The motion to quash was rightly overruled. It is too late to object in the Superior Court that a complaint originally filed in an inferior court is insufficient in form. Pub. Sts. c. 214, § 25. *Commonwealth* v. *Doherty*, 116 Mass. 13. *Commonwealth* v. *Donahoe*, 130 Mass. 280. The complaint in the case at bar follows the language of Pub. Sts. c. 68, § 16, and describes, certainly with substantial, if not with formal, accuracy a violation of that act. It does not, in form or in substance, describe a violation of St. 1890, c. 448, forbidding an itinerant vendor, who is therein defined to be a person engaged in a temporary business and who, for the purpose of carrying on such business, hires, leases, or occupies a building for the exhibition and sale

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of his goods, to sell without a license; the effect and purpose of that act have been described in *Commonwealth* v. *Crowell*, 156 Mass. 215; *Commonwealth* v. *Newhall*, 164 Mass. 338.

The first instruction requested was rightly refused. The complaint did allege an offence. We are of opinion that ice is not included in the term "provisions," within Pub. Sts. c. 68, § 1, providing that any person may go from place to place in the same town exposing for sale and selling, among other things, provisions. The word "provisions" means food, victuals, fare, provender. Ice is neither food, victuals, fare, or provender. This case is not affected by St. 1899, c. 260, subsequently enacted, providing that Pub. Sts. c. 68, § 1, shall apply to ice as well as to provisions.

There was evidence proving the offence complained of. Driving a load of ice through the streets, calling out "Ice, ice," and twice selling ice to a person standing in the street who then and there paid for the same, is sufficient evidence that the defendant was going from place to place carrying and exposing merchandise for sale. The fact that the defendant did this as an employee of a solvent corporation which not only sent out a cart to peddle ice, as the evidence in the case at bar tended to show, but also delivered ice to persons who had previously ordered the same, and the further fact that the occupants of the house, to which the complainant had directed the ice bought by him on the street to be delivered, were among the customers given in the list handed by the company to the defendant, do not make the actions of this defendant here complained of any the less a violation of Pub. Sts. c. 68, § 16. If the defendants wished to raise the question whether the general scope of the defendant's business was delivering ice to those who had previously bought it, and that the sales testified to were exceptional and not in the course of his ordinary business within *Commonwealth* v. *Farnum*, 114 Mass. 267, 271, he should have asked to have that fact left to the jury, under appropriate instructions. In view of the fact that the defendant was driving along calling out "Ice, ice," the two sales made by him on the street were evidence on which the jury were warranted in finding that selling ice from a wagon driven by him was within the general scope of his business; there was no evidence that

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the defendant was at the time delivering any ice to persons who had previously ordered the same. The only evidence of sales or deliveries to persons other than the complainant is found in the statement in the bill of exceptions that the complainant "heard the defendant shout 'Ice, ice,' several times and saw the defendant deliver ice at several houses."

The second and third instructions present the questions presented by the motion to quash, and have already been disposed of in that connection.

The fourth instruction was rightly refused. There was no evidence that "the defendant was a selling agent in the usual course of business of a trader occupying a building for the sale of his goods," and the provisions of St. 1890, c. 448, § 2, exempting such selling agents from the provisions of that act, had no bearing upon this case, in which the defendant was complained of for violating Pub. Sts. c. 68, § 16.

The fifth instruction is but a repetition of the second part of the first instruction, and has been already disposed of in that connection.

The sixth instruction was rightly refused. The fact that the defendant, some time after these sales were made, ceased to be employed by the Boston Ice Company, shows that he was temporarily employed in the established business of that company, not that, at the time in question, he was engaged in a temporary or transient business. He was not engaged in a temporary or transient business within St. 1890, c. 448; and, if he was engaged temporarily in peddling ice for that company, he was guilty of a violation of Pub. Sts. c. 68, § 16.

The seventh request was also rightly refused. The evidence did not tend to prove that the defendant was an itinerant vendor, within St. 1890, c. 448, but did tend to show that he was peddling ice for the Boston Ice Company, which also conducted an established business in selling ice.

The second case was a complaint for the violation of the Revised Ordinances of the City of Boston, of 1892, c. 43, § 35, providing that "No person shall, except in accordance with a permit from the superintendent of streets, in any street or from any building sell any goods or article to any person on the street, or in any street, place, or permit to remain for more

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than ten minutes any goods or article of which he is the owner or in charge, or while on foot, carry and display in any street any show card, placard, or sign."

In this case, the defendant made the same motion to quash and the same request for instructions made by him in the preceding case.

The complaint alleges a violation of the ordinance stated above "fully, plainly, substantially, and formally," within Pub. Sts. c. 213, § 17, which provide that in such a case the by-law on which the complaint is founded need not be set forth. It would have been enough if the complaint had been substantial, because the defendant by not objecting in the inferior court to any defence of form had lost his opportunity to raise those questions at all.

That the by-law in question is a valid exercise of the power given to the city of Boston to exercise the powers set forth in Pub. Sts. c. 27, § 15, was decided by this court in *Commonwealth* v. *Ellis*, 158 Mass. 555. *Exceptions overruled.*

EDWARD B. KELLY *vs.* WAKEFIELD AND STONEHAM STREET RAILWAY COMPANY.

Middlesex. November 21, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Street Railway — Contributory Negligence — Action.

A person, who was driving a horse attached to an ordinary wagon on a street in a town that crossed another street on which were an electric railway and also a row of trees which obstructed the view for some distance easterly from the corner of the streets, when within about sixty feet of the corner looked both ways to see if a car was coming; but, without listening for a car which might have passed behind the trees before he looked, he drove at the rate of four or five miles an hour up to the crossing and collided with a car going west at the rate of twelve to sixteen miles an hour, and was injured. *Held*, that he was guilty of contributory negligence, which precluded him from maintaining an action against the railway corporation for his injury.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. At the trial in the

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Superior Court, before *Hardy*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

S. J. Elder, (*R. Walcott* with him,) for the defendant.

F. P. Curran, (*A. D. Moran* with him,) for the plaintiff.

LORING, J. This was an action to recover for injuries caused by a collision between the plaintiff's wagon and an electric car of the defendant corporation, as the plaintiff was driving into Main Street from Richardson Street in the town of Wakefield. Apparently, Main Street runs east and west and Richardson Street runs north and south. The tracks of the defendant are on the southerly side of Main Street, and distant seven feet or less from the curbstone of the sidewalk on that side of the street. The accident happened about five minutes past seven o'clock on the evening of November 24, 1897. The plaintiff is a grocer, having a store on Main Street, and was, at the time of the accident, driving from the house of a customer, where he had delivered some groceries, to his store. In passing over Richardson Street in the direction of Main Street, the plaintiff crossed the tracks of the Boston and Maine Railroad, and he testified that just after he passed the flagman's house at this railroad crossing he looked both ways to see if an electric car was coming. It is stated in the bill of exceptions that from this flagman's house to the southerly rail of the defendant's tracks in Main Street is eighty feet. The plaintiff was driving a horse attached to an ordinary grocer's wagon, and the distance from his seat on the wagon to his horse's nose was twelve feet. There was a row of pine trees inside the street wall on Main Street, running east from the corner of Richardson Street, and the plaintiff testified that the view of a person seated in a wagon, as he was, would be so obstructed by them, if he were eighteen feet back from the electric car track, that he could not see a car going west from the square or armory to the corner; that a person seated in such a wagon opposite the flagman's house could see two thirds of the distance from the armory to the corner, and that he could not obtain a view up the track towards the armory after he had passed the line of the trees until he reached a point fourteen feet south of the southerly rail of the defendant's track. The plaintiff's evidence tended to

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show that the night in question was dark, with light snow or rain; that the defendant's car came at the rate of twelve to sixteen miles an hour, and that the plaintiff was driving at the rate of between four and five miles an hour. He testified that after he looked for a car at or near the flagman's house, he drove on about his business on the right-hand side of Richardson Street; that he heard no gong, and just as he got to the corner his horse turned or swerved to the left, the fender of the car tripped him, and he fell on his right side toward the car, the car striking the wagon at about the front wheel; and that he was thrown on the ground between his wagon and the car, and when he got up the car had passed him.

We are of opinion that the plaintiff's evidence showed that he was negligent, and that his negligence contributed to the accident.

There is no absolute rule of law requiring a traveller to look and listen before crossing the tracks of an electric railway in a public highway. *Robbins* v. *Springfield Street Railway*, 165 Mass. 30. On the other hand, if it appears that the plaintiff's conduct was negligent, and that such negligence contributed to the injury he has suffered, it is the duty of the court to direct a verdict for the defendant. *Creamer* v. *West End Street Railway*, 156 Mass. 320. *Hall* v. *West End Street Railway*, 168 Mass. 461. Assuming that the trees were as impenetrable as the plaintiff's evidence showed that they were, the plaintiff used due care to avoid a collision with a car which had not gone behind them when he was at the flagman's house; but his evidence does not show that he used any care to avoid a collision with a car which had gone behind the trees before he looked. It may be that it would have done no good to look for a car when clear of the obstruction of the trees; for when he was clear of the trees his horse's nose was two feet from the line of the southerly rail and not one foot from the side of the electric car, if we assume, as we must, that this car had an overhanging side extending over the line of the rail; no ordinary horse, with his nose less than one foot from the side of an electric car going at the rate of from twelve to sixteen miles an hour could be stopped so as to prevent some kind of an accident.

But the plaintiff did not listen before driving from Richard-

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son Street on to whatever might come forth from behind the impenetrable obstruction of the pine trees; if the gong was not sounding, as his evidence shows, the plaintiff would not have been so sure to ascertain by listening that the car was coming as he would have been if the gong had been sounded; but if he had stopped at a safe distance to listen, he must have heard the swish of the electric current and the rattle of the car.

But the decisive reason for holding that the plaintiff was guilty of contributory negligence is that knowing that he could not see a car which was behind the trees, and knowing that a car might have passed in behind the trees before he looked when just past the flagman's house, he did not take any pains to see that such a car had gone by before he drove on to the crossing or so near to it that some accident was inevitable; and, without further looking or listening, he drove about his business up Richardson Street, to the crossing, at the rate of four or five miles an hour, and was run into by the car. If the plaintiff looked when he was personally just past the flagman's house the distance he had to travel before his horse was so near the car that some accident was inevitable, was about sixty feet; if a car had just gone behind the trees when he looked, it had nearly one hundred and eighty feet to travel before reaching the crossing, and more than one hundred and eighty feet in order to go beyond the crossing and leave it clear; a car which had just gone behind the trees when the plaintiff looked had to go at a greater speed than the maximum speed of sixteen miles an hour, testified to by the plaintiff, to get clear of the crossing before the plaintiff was so near it as to make some accident inevitable; and it is apparent that there were many possibilities of a collision arising from a car having gone behind the trees earlier and having proceeded at a slower rate.

It is true that the plaintiff's conduct is not to be judged of in the light of what has happened, but in the light of the circumstances as they then presented themselves to him; and that he cannot fairly be charged with the result of arithmetical calculations made after the event, by persons not confronted with the necessity of action. But the difficulty is that the plaintiff's evidence fails to show that he made any calculation as to when a car which was behind the trees when he looked would get clear

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of the crossing, and after looking when just past the flagman's house he drove ahead on the assumption that no further care was necessary to be taken by him to avoid a collision.

Exceptions sustained; new trial ordered.

COMMONWEALTH *vs.* THOMAS REAGAN.

Suffolk. November 21, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Competency of Child as Witness.

When it is objected that by reason of insanity or youthfulness a witness does not understand the nature of the oath and is therefore incompetent, it is the duty of the judge to examine into the question of his competency, and to reject him unless he is satisfied that he is competent.

INDICTMENT, charging an assault in May, 1899, upon a little girl who was born in November, 1893. At the trial on June 23, 1899, before *Dewey*, J., she was called as a witness by the government and allowed to testify. After a verdict of guilty the case was reported for the determination of this court. If there was error prejudicial to the rights of the defendant in admitting her testimony, the verdict was to be set aside and such order entered as to this court should seem proper "to the end that the prosecution be terminated and the defendant discharged." The other material facts appear in the opinion.

C. S. Sullivan, for the defendant.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

HAMMOND, J. As the result of the *voir dire* examination of the witness the judge was of the opinion that she was not competent, but no formal order or ruling was made, and he permitted her to be sworn and to testify, stating that he should leave the question of her competency to the jury. In his charge to them he gave full and careful instructions as to the law material to that issue, and told them that if they found her competent they should take her statements as evidence, other-

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wise they were to disregard all she had said, and deal with the case as though she had not been called. The evidence as to her competency is not before us, but from the course taken by the judge we must assume that in his judgment it would warrant a finding by the jury that she was competent. The defendant excepted to this course, contending that it was the duty of the court alone to decide that question. The jury brought in a verdict of guilty, and in reply to the question put by the court said that they found the witness competent, and in reaching their verdict they treated her as such and relied in part on her testimony. We assume that her testimony was prejudicial to the defendant, and therefore the simple question raised on the report is whether there was error in law in the method of dealing with the question of the competency of the witness.

Speaking generally, the text books on evidence lay down the proposition that in a jury trial all questions as to the admissibility of evidence are for the judge. Thus Starkie says, "In civil as well as criminal proceedings, the competency of an infant is a question of discretion of the court." 2 Stark. Ev. (4th Am. ed.) 393.

Phillips says, "It is the province of the judge presiding at the trial, to decide all questions on the admissibility of evidence; it will be for the judge also to decide any preliminary question of fact, however intricate, the solution of which may be necessary for enabling him to determine the other question of admissibility." 1 Phil. Ev. (4th Am. ed.) 3. And again he says that the competency of a witness is a condition precedent to admitting his evidence. "The judge alone has to decide whether such condition precedent has been fulfilled. If proof is offered by witnesses, he is to decide upon their credibility. If counter evidence is proposed, he must receive it before he decides; and he has no right to ask the opinion of the jury on the fact as a condition precedent." p. 6.

Roscoe says, "It is for the court to decide upon the competency of witnesses, and for the jury to determine their credibility." Roscoe, Crim. Ev. (12th ed.) 100. The rule is laid down by Greenleaf, Taylor, and Wharton in equally positive terms. 1 Greenl. Ev. §§ 81 (e), 161 (b). Taylor, Ev. 23 a. Whart. Crim. Ev. §§ 370, 373.

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And this is so whether the objection to the competency is made upon the ground of interest, insanity, or infancy. Other familiar examples of the application of the rule are where confessions or dying declarations are offered in evidence. It is stated by Greenleaf that if the decision of the admissibility of the evidence depends upon the decision of other questions of fact, as, for example, the fact of interest of the witness or the due execution of a deed, in such cases it is allowable for the judge at his discretion to submit the question of the admissibility of the evidence to the jury, with instructions to consider it as evidence or not, according as they decide that question. 1 Greenl. Ev. § 81 (e). *Gordon* v. *Bowers*, 16 Penn. St. 226.

But these cases are regarded as exceptions to the general rule, and it may be doubted whether the language of Greenleaf is not too broad, as applied at least to the practice in England and to criminal cases. See 1 Phil. Ev. (4th Am. ed.) 6, and the language of Erle, J., during the argument in the case of *Jenkins* v. *Davies*, 10 Q. B. 314, 320; and of Denman, C. J., in delivering the judgment of the court in the same case, at p. 323.

But whatever may be the scope of this exception, it is certain that in the case of dying declarations, infancy, and insanity the rule itself is very strictly adhered to. It is true that in *Rex* v. *Woodcock*, 1 Leach C. C. 500, Eyre, C. B., left to the jury the question whether the deceased was aware that she was in a dying condition at the time of making the declarations offered as dying declarations. That case, however, has not been followed, but has been virtually overruled by subsequent cases.

In *Welbourn's case*, 1 East P. C. 358, 360, which was an indictment for murder, evidence was admitted of statements as dying declarations. The preliminary question was whether the deceased knew she was dying. It was left to the jury to say upon the whole evidence whether they were satisfied that the deceased knew her situation at the time she made the statements. The prisoner was convicted. The case being referred to the judges, they decided by a majority opinion that it did not sufficiently appear that she knew she was in a dying state when she made the statements; "and they all agreed that whether the deceased thought herself in a dying state or not was matter to be decided by the judge in order to receive or reject

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the evidence, and that that point should not be left to the jury." To the same effect is *John's case*, 1 East P. C. 357. See also *Rex* v. *Hucks*, 1 Stark. 521, 522, and a note to the same at the end of the case by Starkie, wherein he says that the decision in *Rex* v. *Woodcock*, *ubi supra*, is inconsistent with principle. See also *Bartlett* v. *Smith*, 11 M. & W. 483; *Jenkins* v. *Davies*, *ubi supra*; *Harris* v. *Great Western Railway*, 1 Q. B. D. 515, 533; *Regina* v. *Hill*, 5 Cox C. C. 259; *Regina* v. *Perkins*, 2 Moody C. C. 135; *Carpenters' Co.* v. *Hayward*, 1 Doug. 374, 375. Bul. N. P. 297.

The practice in this Commonwealth is stated by Morton, C. J., in *Commonwealth* v. *Preece*, 140 Mass. 276, as follows: "When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise, it should be excluded. When there is conflicting testimony, the humane practice in this Commonwealth is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession, if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant."

In *Commonwealth* v. *Culver*, 126 Mass. 464, Lord, J., alluding to the practice sometimes followed in a criminal case, where an objection to an alleged confession of a defendant is made upon the ground that it was improperly obtained, for the judge to allow the confession and all the evidence bearing upon the manner in which it was obtained to be submitted to the jury, either to be rejected wholly by them, or to be allowed such weight as under all the circumstances they think proper, says that this is done rather by consent than otherwise, neither party desiring to take the decision of the judge upon the question; but he adds, "The prisoner has always the right to require of the judge a decision of the competency of the evidence; and, even after the judge has decided the evidence to be competent, the prisoner has the right to ask of the jury to disregard it, and to give no weight to it, because of the circumstances under which the confessions were obtained." And the practice, as thus stated, is well settled in this Commonwealth.

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M'Managil v. *Ross*, 20 Pick. 99. *Dole* v. *Thurlow*, 12 Met. 157. *Commonwealth* v. *Brown*, 14 Gray, 419. *Commonwealth* v. *Mullins*, 2 Allen, 295. *O'Connor* v. *Hallinan*, 103 Mass. 547. *Commonwealth* v. *Coe*, 115 Mass. 481. *Commonwealth* v. *Preece*, 140 Mass. 276. *Commonwealth* v. *Bond*, 170 Mass. 41, and cases there cited. As to decisions in other States upon the question, see *Hughes* v. *Detroit, Grand Haven, & Milwaukee Railway*, 65 Mich. 10; *Carter* v. *State*, 63 Ala. 52; *People* v. *McNair*, 21 Wend. 608; *McGuire* v. *People*, 44 Mich. 286; *State* v. *Edwards*, 79 N. C. 648; *People* v. *Linzey*, 79 Hun, 23; *Flanagin* v. *State*, 25 Ark. 92; *Coleman* v. *Commonwealth*, 25 Gratt. 865; *People* v. *Bernal*, 10 Cal. 66; *Simpson* v. *State*, 31 Ind. 90; *State* v. *Le Blanc*, 8 Brev. (S. C.) 339; *Lester* v. *State*, 37 Fla. 382; *Holcomb* v. *Holcomb*, 28 Conn. 177; *State* v. *Whittier*, 21 Maine, 341, 347; *Cook* v. *Mix*, 11 Conn. 432; *State* v. *Scanlan*, 58 Mo. 204; *Peterson* v. *State*, 47 Ga. 524; *Mead* v. *Harris*, 101 Mich. 585; *Bowdle* v. *Detroit Street Railway*, 103 Mich. 272.

The rule conduces to the orderly and efficient conduct of a trial. It is also of the gravest importance in a criminal case that the radical question whether a witness understands the nature of an oath should be considered by itself in the first instance, free from any complication with the nature of the evidence he is expected to give, or its bearing upon the issues of the case.

When the decision is to be made by a mind so situated as to be in danger of being influenced by the nature of the story as told by the witness and the importance of the testimony and its bearing one way or the other, it is plain that the decision is not so likely to be upon the real merits of the question as it otherwise would be; and it is easy to see, as indeed this very case may perhaps show, that with the whole case before the jury there is danger that the question of the competency of a witness may be decided according as his testimony may be legally necessary to sustain a view of the case which the emotions of the jury may lead them to take, if they can find evidence enough to justify them.

Upon principle, and by an overwhelming weight of authority in England and in this country, we are satisfied that when

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a witness is called, and it is objected that by reason of insanity or youthfulness he does not understand the nature of the oath, and is therefore incompetent, it is the duty of the judge to examine into the question of his competency, and to reject him unless he is satisfied that he is competent. Against the objection of the prisoner a different course was taken in this case. The judge was of the opinion that the witness was not competent. It was the right of the prisoner upon that finding to have the witness excluded.

The verdict should be set aside. Since it is possible that at another trial the witness, by reason of mental development and instruction, general and special, may have sufficient comprehension of the nature and obligation of an oath to satisfy the court that she is a competent witness, we make no further order. *Verdict set aside.*

MARTIN FARRELL *vs.* GERMAN AMERICAN INSURANCE COMPANY.

Middlesex. November 21, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Fire Insurance — Action — Award — Conduct of Arbitrators.

The writ in an action upon an award made under a policy of fire insurance was dated three days before the expiration of the time limited in the policy for bringing an action, but it was not served until about fifty days afterwards, and was duly entered at the next entry day. Two witnesses testified that they saw the writ on the day of its date. *Held*, that the action was seasonably commenced.

In this case, which was an action upon an award made under a policy of fire insurance, signed by two only of the arbitrators, the award was not invalidated by the acts of these arbitrators in the absence of the other one, consisting of experiments with articles similar to those insured, a visit to the scene of the fire and examination of the débris, conversations with other persons in relation to the case, talks with each other, and an examination of the books of one of them in regard to prices of goods.

CONTRACT, to recover upon an award made under a policy of insurance against loss by fire issued by the defendant upon the plaintiff's property in Dracut. Trial in the Superior Court,

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without a jury, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

The policy was in the form prescribed by St. 1887, c. 214, § 60, for the term of one year from February 1, 1892, and covered household furniture to the amount of $200, and stock in trade to the amount of $1,100, all situated in a frame building in Dracut, the loss being alleged to have been sustained by a fire which occurred on January 29, 1893. An agreement for arbitration as to the amount of the loss was entered into, in which Charles Callahan of Lowell was selected by the plaintiff, Joseph F. Appleton of Salem was selected by the defendant, and Charles T. Rowland of Lowell was chosen by the two so selected. These three persons duly accepted their selection as arbitrators, and an award was made on January 19, 1895, by Callahan and Rowland, in which Appleton refused to join, fixing the amount of the loss at $1,269.23. The writ was dated January 26, 1895, service was made upon the insurance commissioner on March 16, 1895, and the action was duly entered in court on the first Monday of April, 1895. The principal ground of defence was that an attempt had been made to defraud the defendant after the loss in representing goods to have been upon the premises and destroyed by the fire that were not there at the time of, and were not destroyed by, the fire, but no dispute was made as to the item of household furniture, the defendant agreeing that the plaintiff's loss thereon was $200, as claimed. Other grounds of defence relied upon at the trial were: 1. That the action had not been seasonably commenced. 2. That the acts of the arbitrators were such as to render their award invalid. 3. That, there being no valid award, the action was prematurely brought.

Upon the first point raised by the defendant, two witnesses for the plaintiff testified that they saw the writ on the day of its date.

Upon the second point, in relation to the acts of the arbitrators, one Irwin W. Smith testified that he was sent by the defendant to the scene of the fire some ten days after its occurrence to examine the débris; that the plaintiff told him that none of the débris had been moved; that he reported finding twenty-two ends and thirty-five sides of tin cans, representing

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421 cans of canned goods, a pair of arctics and a lady's overshoe, representing boots, shoes, and rubbers worth $521.31, and about a bushel and a half of broken crockery, representing crockery worth about $50, all as claimed in the plaintiff's proof of loss; and that he also found unconsumed cigars, herring, beer cases, and whiskey barrels in the débris. There was conflicting testimony by a witness for the plaintiff as to the removal of some of the débris before its inspection by Smith, and the deposit of the débris so moved across the street from the location of the destroyed building. It was undisputed that, after Smith's inspection, the cellar was cleared and the débris deposited in the place across the street above referred to. There was evidence that following the first appearance of the fire there was an explosion of considerable force; that this was a quick fire; and that the inmates of the house escaped with difficulty.

Callahan, the arbitrator selected by the plaintiff, testified that, after the matter was submitted to the arbitrators and before their award and in the absence of all other persons, he subjected crockery to intense heat in his furnace, took it out and threw water upon it, and brought in the crockery so treated and exhibited it to the other arbitrators at a hearing before them at which both the plaintiff and the defendant were represented by counsel, and no objection was made.

Rowland testified that, after the matter was submitted to the arbitrators and before their award and in the absence of all other persons, he subjected tin cans to intense heat in his furnace and observed the result and reported the same to the other arbitrators.

There was evidence that the arbitrators after their last hearing went to Dracut and dug in the place where some of the plaintiff's witnesses had testified that débris had been deposited soon after the occurrence of the fire, and where it was undisputed that the débris which was in the cellar at the time of Smith's inspection had afterwards been deposited, to see whether the débris was as the plaintiff represented, or as the defendant represented. Counsel for the plaintiff and the defendant were present while the arbitrators were making their examination of the débris, and neither counsel made any objec-

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tion thereto. Relative to this matter Rowland was asked by the plaintiff's counsel: "And after that, by agreement between the counsel and the referees, was a view taken of the premises where this débris was deposited? to which he answered, "Yes." He was then examined as follows: "*Q.* Did Mr. Forbush [defendant's counsel] agree? *A.* I did n't talk with him about it. — *Q.* Did you hear a conversation that took place there in open court about it? *A.* I don't remember it."

Callahan was not asked about this matter, and Appleton testified that he did not remember any agreement by counsel, and thought it was simply an agreement between the arbitrators.

Rowland, on cross-examination, was asked if he did not talk with one O'Leary in relation to the case, and admitted that he did, but testified that he did not talk with him much, "not half a dozen words, all told"; and that the conversation had no effect upon his mind in making up the award.

Callahan, on cross-examination, also testified that he talked with O'Leary in relation to the case.

On redirect examination, Callahan testified that this talk did not in any manner affect him in making up the award. It did not appear what the talk was which Rowland and Callahan had with O'Leary respectively further than that it related to the case, nor whether either talk was before or after the making of the award, nor whether any one else was present at the time of each talk. The defendant contended that Callahan and Rowland talked with O'Leary respectively as above stated in the absence of the other arbitrators and prior to the signing of the award. This was not disputed, but the plaintiff contended that it did not appear whether or not the conversations were of importance or influenced the minds of the arbitrators.

Rowland also testified, on cross-examination, as to a conversation with Mr. Qua, who was the auditor in a prior action by the plaintiff against the defendant, in relation to this case; and that it was not until after the award was made.

The evidence was undisputed that, after the final hearing of evidence by the arbitrators and before the award was made, Appleton had been ill; and that the other two arbitrators had met and had had conversations about the case.

Rowland testified further that he called upon one Abbott,

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the local agent of the defendant at Lowell, and said to him, "We shall put in our award if we don't hear from Mr. Appleton"; that he had written to Appleton, and had not heard from him; and that the time within which the award was to be made was about expiring.

There was evidence that Rowland and Callahan made efforts from time to time to have meetings of all the arbitrators and to secure Appleton's attendance; that owing to Appleton's engagements and subsequent illness, and for other reasons, they were not successful; and that there were two or three meetings, all the arbitrators being present, at which witnesses and counsel were heard.

Rowland and Callahan each testified that at no time before going to Appleton's office on the day on which the award was signed was there any agreement between any two of the arbitrators as to what the amount thereof should be.

Callahan, on direct examination, testified that he made the award on the basis of the evidence in the case; that he had had seventeen years' experience in the grocery business, at times employing fourteen men; that at a meeting of the arbitrators, Appleton said there was no question as to the amount of the goods, but only as to their value, and contended that such goods sold at a forced sale would shrink from forty per cent to seventy-five per cent, and that he divided them in three classes, and one was forty per cent and the other was seventy-five per cent, and he thought an average would be fifty per cent; and that if the arbitrators would consider that proposition he, Appleton, was ready to settle. The evidence showed the stock to consist of dry and fancy goods, boots, shoes, and rubbers, as well as groceries; and there was no evidence that either Rowland or Callahan had had any experience in dealing in or handling any other goods than groceries, including crockery and glassware and canned goods in tin cans; while it appeared in evidence that Appleton's business was the handling of fire and collision goods, and that he made a specialty of going around and buying stocks of this character.

Callahan also testified as follows: "*Q.* Did you have any talk with any outsiders about it? *A.* I think I did. — *Q.* Was there any of them that influenced your mind in any manner

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or shape as to how this award should be made? *A.* Not at all." It did not appear what this talk was.

On cross-examination, the witness testified as follows: "Mr. Rowland called my attention and said, 'I have been through the books to see how the prices would compare with the plaintiff's prices, — been through my books at that date for similar goods, — and I find some things were charged too high and some too low, and it would be about one and three fourths per cent it would come to.' And he said, 'I have concluded to make it two per cent.' I said to him I would like to see the books myself. I went down to his store one evening, and he presented the books to me, and I looked the books through a little, and as far as I went his figures were correct. I did n't go clear through the books. I took it for granted that he was correct. And I agreed in the meeting that we had in Runnell's Building to make that discount."

It did not appear, otherwise than as the fact may be fairly inferred from the evidence stated, whether this meeting in Runnell's Building was one in which all three of the arbitrators were present, or a meeting between Rowland and Callahan in the absence of Appleton. There was evidence, however, of at least one meeting of all the arbitrators in Runnell's Building.

Rowland testified, in relation to the conversation, which took place between the arbitrators at the meeting when the award was signed, as follows: "Mr. Appleton said he was very set. I said, 'If I am wrong I want to be righted.' He said that he did n't know as he wanted to change my opinion; that I had a perfect right to my opinion, as every man had; that he had his, but if we would settle the case that he would divide the amount. I told him that I could n't do that; I had got to settle the case according to the evidence in my judgment as I saw it. He said if that was it he could n't have any more to do with it; that he would get out of it; that there was no use for any further argument in the matter; that there were two against one, and, of course, he could n't do anything. I asked him if he wanted to say anything, or join us, and he said 'No.'" This testimony was corroborated substantially by that of Callahan.

Appleton testified in relation to this matter as follows: "Mr. Rowland told me that they had met and had agreed upon a dis-

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count of two per cent to be taken off of the whole amount of the plaintiff's claim. . . . I said, 'If you gentlemen have settled this thing what use am I in the matter, anyhow?' . . . Upon that I said that if those two gentlemen had settled the case outside of me no court would sustain it in the world, and I was out of it; I didn't care to have anything more to do with it."

There was evidence that the award was signed by Callahan and Rowland in Appleton's office at the time of their meeting; and that Appleton declined to sign it.

The defendant asked the judge to rule: "1. Upon the evidence, the plaintiff's action was not seasonably commenced. 2. Upon the evidence, the award of the arbitrators is invalid by reason of misconduct upon their part." And if the judge should rule as requested in the second request, "3. The action was prematurely brought and cannot be maintained."

The judge declined to rule as requested; found that the arbitrators acted in good faith; and found for the plaintiff in the sum of $1502.76. The defendant alleged exceptions.

F. M. Forbush, for the defendant.

D. J. Donahue, for the plaintiff.

MORTON, J. This is an action to recover upon an award for a loss under a fire insurance policy, and was heard by the court without a jury.

The first question is whether the action was seasonably commenced. The writ was dated three days before the expiration of the time limited in the policy for the bringing of an action. The date of the writ was *prima facie* evidence of the commencement of the action. *Veginan* v. *Morse*, 160 Mass. 143. *Bunker* v. *Shed*, 8 Met. 150. *Gardner* v. *Webber*, 17 Pick. 407, 412. There was nothing which as matter of law required the court to find that the writ was made provisionally. Whether it was so made or not was a question of fact, and we think that it was competent for the court to find on the evidence before it, and for aught that appears it did so find, that "the writ was made at the time it bore date, with an intention to cause it to be seasonably served on the defendant, before the term [sitting] to which it was returnable." *Bunker* v. *Shed*, 8 Met. 150, 151. It would follow from such a finding that the action was seasonably commenced.

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Tho remaining questions relate to instances of alleged misconduct on the part of two of the arbitrators and to their effect upon the validity of the award.

The policy was in the Massachusetts standard form, and the arbitrators were appointed under the clause which provides that in case the parties fail to agree upon the amount of a loss, the matter shall be referred to three disinterested persons, one to be selected by the insured, one by the company, and the two so chosen to select a third, — the award of a majority to be final. It is manifest that the arbitration thus provided for is intended to afford a simple and speedy remedy for the settlement of disputes in regard to losses, and to simplify proceedings in case of a resort to the courts, and is not necessarily to be governed in all respects by the rules which apply to a trial in court. We think that an award so arrived at is not to be lightly set aside even though there may have been informalities or irregularities in the conduct of the proceedings, if it appears, or the court may have found, that the arbitrators making the award acted in all matters pertaining to the submission in good faith and with an honest desire to come to a correct result. In such a case, the award, it seems to us, should stand, unless it plainly appears that the acts of alleged misconduct have prejudiced or may have prejudiced the party complaining, or have violated those well settled rules which justice requires should be observed in order to ensure the fair determination of the matters in dispute. See *Nichols* v. *Nichols*, 136 Mass. 256, 260; *Straw* v. *Truesdale*, 59 N. H. 109. Whether in any given case there has been such misconduct as to require the award to be set aside, will generally be a mixed question of law and fact, mostly of fact, (*Morville* v. *American Tract Society*, 123 Mass. 129, 139,) in regard to which the finding of the trial court will of course be final. The precise question therefore in the present case is whether it can be said as matter of law that the judge who heard the case erred in refusing to rule upon the evidence before him that the award was invalid. We do not think that it can be so said.

Callahan's experiment with crockery and the results were all reported by him to the other arbitrators at a meeting at which witnesses and counsel were present, and no objection was made. If there was any irregularity, it must be deemed to have been waived.

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A similar experiment by Rowland with tin cans and the results were reported by him to the other arbitrators, and come, it seems to us, fairly within such examination and testing of the evidence as was permissible to the arbitrators. *Small* v. *Trickey*, 41 Maine, 507. *Adams* v. *Bushey*, 60 N. H. 290.

It was competent, we think, for the court to find on the evidence before it that the visit of the arbitrators to Dracut and what took place there was with the knowledge and consent of both parties and their counsel. If so, there was no irregularity or misconduct in it.

The conversations between Rowland and O'Leary and Callahan and O'Leary are not stated. They may have been entirely immaterial. Rowland testified that the conversation between him and O'Leary was "not half a dozen words all told." Both testified that the conversations had no effect upon them in making up the award. It is possible also that the court may have found in these cases, as well as in regard to the conversation between Rowland and Mr. Qua, that the conversation was after the award had been made. We do not see how it can be held as matter of law that the court erred in refusing to set aside the award because of these conversations. See *Johnson* v. *Holyoke Water Power Co.* 107 Mass. 472; *Johnson* v. *Witt*, 138 Mass. 79; *Commonwealth* v. *Desmond*, 141 Mass. 200.

So also we think that it cannot be held as matter of law that the talk, which is not given, of Callahan with outsiders, requires that the award should be set aside.

The remaining matters relate to talks, in the absence of the third, between the two arbitrators who finally signed the award. Both testified that they did not come to any final conclusion until the last interview, at which all were present, and at which, after unsuccessful efforts to agree with the third arbitrator, the award was signed by them. If any excuse or justification be needed for their talking with each other, it is found, we think, in the fact which there was testimony tending to prove, that the two had made efforts to have meetings of all three of the arbitrators, and had failed on account of the engagements and illness of the third arbitrator, and for other reasons, and that, as one of them told one Abbott, the agent of the defendant company, which selected the other arbitrator, "the time within which the

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award was to be made was about expiring." We see no objection to the examination which was made by the two arbitrators of Rowland's books in regard to prices. Presumably one ground at least of the selection of Rowland and Callahan was their greater or less familiarity with the business in which the plaintiff was engaged. They had the right to draw upon their own experience and knowledge in considering the matters submitted to them, and it was certainly better for all concerned to do as they did, than to trust to their unaided recollection, or to accept without question the prices to which the plaintiff had testified. See *Adams* v. *Bushey*, 60 N. H. 290; *Straw* v. *Truesdale*, 59 N. H. 109. Moreover, there is some evidence, though slight, that what they had done was communicated to the other arbitrator at a meeting when all were present.

On the whole case, we see no ground which requires as matter of law that the award should be set aside. The arbitrators who signed the award seem to have taken unusual pains to reach a correct result. They and the other arbitrator were before the court, which found that they acted in good faith, and we cannot say as matter of law that his ruling in favor of the award was wrong. *Exceptions overruled.*

MYRON P. WALKER *vs.* MARY N. WALKER.

Hampshire. December 5, 1899. — March 1, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Memorandum of Contract — Letter — Signature — Statute of Frauds — Contract to transfer Property in Consideration of Marriage — Allegations of Bill in Equity.

It is immaterial that the memorandum of an alleged contract is in the form of a letter, if it is sufficient in other respects to satisfy the statute of frauds.

The signing by the defendant by his Christian name only is as binding upon him, within the statute of frauds, as if his signature were written in full.

The fact that an alleged antenuptial contract did not contain a schedule of the property to be affected by it, and was not recorded in the registry of deeds, does not affect its validity as between the original parties to it, the requirements of the statutes in regard to schedules and recording being for the protection of creditors.

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The averments of the bill in equity in this case, brought by a husband against his wife to enforce an alleged antenuptial agreement made by her, are not sufficient to entitle the plaintiff to an interest in his wife's estate while they are living apart after a permanent separation.

BILL IN EQUITY by a husband against his wife to enforce an antenuptial agreement made by her and to secure his rights to the property covered by that agreement. The defendant demurred to the bill, assigning various grounds therefor, and *Barker*, J., at the request of the parties, reserved the case for the determination of the full court. The facts appear in the opinion.

E. H. Lathrop, for the defendant, submitted the case on a brief.

E. C. Bumpus & E. A. Whitman, for the plaintiff.

KNOWLTON, J. Some of the causes for demurrer relied on by the defendant are insufficient. It is immaterial that the memorandum of the alleged contract is in the form of a letter, if it is sufficient in other respects. *Smith* v. *Allen*, 5 Allen, 454. *Stoddert* v. *Bowie*, 5 Md. 18. *Peck* v. *Vandemark*, 99 N. Y. 29. The signing by the defendant by her Christian name only is as binding upon her as if her signature were written in full. *Sanborn* v. *Flagler*, 9 Allen, 474. That the alleged contract did not contain a schedule of the property to be affected by it, and was not recorded in the registry of deeds, does not affect its validity as between the original parties to it. The requirements of the statutes in regard to schedules and recording are for the protection of creditors. Pub. Sts. c. 147, § 27. St. 1867, c. 248. *Cook* v. *Adams*, 169 Mass. 186.

The more difficult and important question in the case is whether the bill sets out a contract to transfer property from the defendant to the plaintiff in consideration of marriage. The plaintiff in the bill gives at length four letters, and says he has thirty-eight others, written while he was in California and the defendant in Europe, and while they were betrothed and were arranging for their expected marriage. The letters which are set out are affectionate, and are full of such matters of personal interest as a young woman might be expected to communicate to her future husband. In only two of them is there any reference to her property, or to her intentions in regard to the dis-

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position or use of it. In one of these, under date of September 3, 1877, is this language: "Now, dear Myron, for the practical part of your letter. We cannot alter our circumstances. We did not *make* them, and I assure you *they* cannot change me, but I shall certainly take every advantage that they offer to promote your interests. I think you have struggled *nobly*, and been successful to an uncommon degree. Now I should *like* to see what you could do in working for yourself alone. As I hope to share in the honor and success that will some day crown your efforts, may I not also assist you in working to that end? I will tell you plainly what I intend to do. The money that my father gave me before his death, I shall keep always for myself. Of that which has come to me *since*, I shall settle a generous portion upon each of the children, the interest of which will be more than sufficient to clothe and educate them with every advantage. Having thus provided for them, so that no one can feel that I have jeopardized their interest in seeking my own happiness, and given some thousands to poor relations and friends, I shall consider the balance common property, neither thine nor mine, but *ours*, to be used for the general good in making a happy home, in building up a business, and in relieving the distress so prolific in this world of ours. What do you think of my idea? I think I have answered the *main* points of your letter, though very briefly, and have *so much* to say on this subject, but not to-night." In a letter of September 11, 1877. she wrote as follows: "Now, I want to say a word about money matters. I am the only one of the family, that is, mother or the girls, who knows much about the position, size, etc., of father's estate. Uncle sent me a memorandum when I requested it, asking me not to mention it, because he thought it would be unwise for the girls, or people outside, to have an idea of the extent of their means, and of course one has just as much as the other, only I, having family, use more than they do. He assured me, and so did Jim, that no property anywhere in the United States was *better secured*, that it was much more profitable to us and easier for *him* to keep it together as long as there were minor children, which will be for five years yet, but if a majority wished it, division should be made. Now I should *prefer* a moderate sum safely invested and under my own control, at the

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same time, do not wish to force an issue that would look as though I lacked confidence in him or his judgment, because I do not. That is one reason why I have never told you anything definite about my affairs. I feel a pride in being able to say, when you go to him, as you must do before long, that you do *not* know of them, that I have *kept* the confidence he reposed in me, and that though 'in love' I can still be *just* and *practical*. I shall tell him, as I did you not long since, what my intentions are in regard to my property; an ample provision for the children and myself, and then the rest to be made use of to our mutual benefit. He seemed to find no difficulty in spending $20,000 for me when I wished it, and I shall expect none in raising more when occasion requires." These are the only specific statements of either party referred to in the bill as a foundation for the plaintiff's contention that they entered into an antenuptial contract. Looking now at the first of these letters, it is to be noticed that the plaintiff does not aver that "the practical part," or "the main points," of his letter, which the defendant answered, purported to look towards the making of any contract in reference to property. He does not aver that he wrote in reply to either of these letters anything to show that he understood that the parties were making an antenuptial contract. She was a young woman with three children, who a short time before had been divorced from her husband, and who was possessed of property in her own right amounting to more than $500,000. He was a young man engaged in an insurance business in California and apparently without much property. The letters indicate that he had seemed to deprecate an alliance with a woman of so great wealth before he had himself achieved financial success, and that she sought to reassure him, and to show her desire freely to use her money as well for his benefit and enjoyment as for her own. Her feelings, and her expression of them, were founded on an expectation that they were to live together as husband and wife during their joint lives. Seemingly she did not permit a thought, much less an expression, which looked to a possibility of divorce or separation. In this letter she seems to be stating her intention in regard to the management and use of her property, rather than providing for a change of the title. Throughout this part of the letter she

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speaks in the first person, without a suggestion that any one else is to displace her in her legal ownership, or that she is to abdicate her rights. She says in substance that after setting apart that which her father gave her, and making a generous settlement upon each of the children, and large gifts to poor relatives and friends, she is to hold the rest of her estate for their common use in their home life, in building up a business for him, "and in relieving the distress so prolific in this world of ours." Instead of saying that she shall convey a part to him and thus change the legal title, she says, "I shall consider the balance common property, neither thine nor mine, but *ours*, to be used for the general good." This plainly has reference to her intention as to the use of property of which she holds the title, rather than to an intention to transfer the ownership; and just as clearly it has reference to a use while they are living together in the ordinary relations of husband and wife, not to a use of it after a permanent separation.

If the meaning of this letter, taken by itself, or considered as a part of the general correspondence, were doubtful, the letter of September 11, taken in connection with the other letters, would make it clear. The defendant's letters show much sensitiveness in regard to the view which her relations and friends will take of the intended marriage, and particularly lest some of them should suspect the plaintiff of mercenary motives. In this letter she refers to the fact that she had never told the plaintiff anything definite about her affairs, and that she feels a pride in being able to say that he does not know of them. Here she impliedly repudiates in the strongest terms any possible suggestion that they had made or contemplated making an antenuptial contract. She wishes to have her uncle understand, that which she treats as a fact, that this will be a marriage into the arrangements for which considerations in regard to property have not entered. Referring to the previous letter to the plaintiff, she calls it an expression of "what my intentions are in regard to my property." Instead of treating it as a part of a contract, or as implying an intention to change the title, she refers to an intended provision for herself and the children, which she evidently regards as a special appropriation to be kept apart from the risks of ordinary financial changes, and states as her

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intention as to the rest of her property that it is to be made use of for the mutual benefit of herself and her husband. Presumably it is so to be made use of while under her legal control.

It is contended that the averments as to the performance of the contract entitle the plaintiff to relief. But all of these averments, so far as they purport to rest upon a contract, are founded on these two letters. In the bill the plaintiff says that in marrying the parties acted "upon the terms and conditions set forth in the said letters referred to, and the other letters which may be examined, namely," etc. When he states as one of the terms of the letters that the balance was to "be treated and considered as common property, and should be held for the mutual benefit and interest, and belong to and be the property of both the parties concerned," he means, as we understand the letters, that the property, while belonging to the defendant as legal owner, was expected to be used for the common benefit while the parties lived together as husband and wife. The averments in regard to the turning over of the property by the defendant to the plaintiff under this contract mean nothing more than that she intrusted the property to his management and use for their joint benefit. This is the true legal interpretation to be put upon the averment of the bill, in which "the plaintiff further says that until his wife had taken possession of the estate as hereinafter set forth, the terms of the contract set forth in the letter dated September 3, 1877, and confirmed by letter dated September 11, 1877, and the other letters, were carried out by the parties, and the property was owned and held in common as the estate of both, to be held and enjoyed for their mutual benefit." In the beginning she undoubtedly had implicit confidence in him. Taking all of these averments together, it is the common case of a woman of large fortune who trusts the management and control of the whole of it to her husband for their joint benefit. The "strict accounting to her of the affairs of the estate" which he avers that he made in 1887, and again in 1890, after she had taken possession of it, are in accordance with this view. The bill does not aver that any settlement was made upon either of the children, or that any formal action was ever taken, as if in execution of an antenuptial contract.

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It is stated in the bill that there has been a permanent separation of the parties. If the plaintiff could enforce his claim upon the property in case his wife had wilfully refused to live with him without just cause, which we do not intimate, the bill does not show such a wrong on her part. The only alleged wrong charged against her is her taking and retention of the property. While the plaintiff avers that he faithfully performed his duties in regard to the care of the estate, he says nothing about his general conduct as a husband, and it does not appear whether the defendant was or was not justified in refusing to live with him.

We are of opinion that the averments of the bill are not enough to show an antenuptial contract which entitles the plaintiff to an interest in his wife's estate while they are living apart after a permanent separation.

Demurrer sustained.

MALCOLM McLOUD *vs.* ELLEN MACKIE.

Suffolk. December 7, 1899. — March 1, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Writ of Entry — Tax Title — Disseisin — Statute — Constitutional Law.

The grantee in a deed, made since St. 1891, c. 354, from the purchaser at a sale of the land for taxes assessed upon the whole estate to one of two joint owners thereof, may maintain a writ of entry to recover the same against a person, who, having been in occupation as a paying tenant of the owner, upon condemnation of the premises by the board of health, vacates them and afterwards repairs them at his own expense to the satisfaction of such board, and then moves back and occupies them without paying rent for several years.

The St. 1891, c. 354, providing that "notwithstanding disseisin or adverse possession, any conveyance of real estate otherwise valid shall be as effectual to transfer the title as if the owner of the title were actually seized and possessed of such real estate, and shall vest in the grantee the rights of entry and of action for recovery of the estate incident to such title," is constitutional.

WRIT OF ENTRY, to recover a parcel of land in Boston. Plea, *nul disseisin*. Trial in the Superior Court, without a jury, before *Aiken*, J., who found for the demandant; and the tenant alleged exceptions. The facts appear in the opinion.

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R. Lund, for the tenant.

H. G. Allen, for the demandant.

KNOWLTON, J. The real estate in question was owned by John O. Bradford from the time of his purchase of it in 1862 until his death on October 17, 1897 It then passed by descent to his sons James O. Bradford and Edward T. Bradford. The bill of exceptions shows that the share of Edward was conveyed by a series of deeds duly acknowledged and recorded, the last of which is to Elizabeth B. Wheeler, and was dated and recorded April 18, 1895 On May 1 of that year the whole estate was taxed to her, and was subsequently sold for non-payment of taxes, and the demandant has this tax title.

The Pub. Sts. c. 11, § 13, as amended by the St .1889, c. 84, read in part as follows: "For the purpose of assessing and collecting taxes on real estate, the persons appearing in the records of the county where the real estate lies as the owners thereof on the first day of May, even if deceased, shall be held to be the true owners thereof." The St. 1888, c. 390, § 56, is in these words: "Every sale or taking of real estate for payment of taxes shall be deemed to be in the name of the owner or owners thereof, if the proceedings of assessment, sale or taking are made in the name of one or more of the persons who appear as record owners of such estate at the date of assessment; but any taking of real estate for payment of taxes shall be of the whole estate, and no sale or taking shall be of the undivided interest of any one or more of the joint owners thereof."

On May 1, 1895, Elizabeth B. Wheeler was the owner of the property within the meaning of the statute, and the tax upon the whole estate was properly assessed to her, and the sale for non-payment of taxes gave the demandant a good title to the whole, subject to redemption. The tenant in this case was a tenant in occupation of the premises holding under the owner from 1877 to July 1, 1884, and she paid rent therefor from March, 1879, to March, 1884. The only evidence on which she founds her claim to a different title since is that in June, 1885, the board of health condemned the premises and ordered the tenants to move out, which she did at once; that she afterwards put the premises in repair at her own expense to the

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satisfaction of the board of health, and moved back, and has remained there ever since without paying any rent.

The evidence well warranted a finding for the demandant upon his tax title alone. The tenant's contention that the demandant's title is bad because the grantors in some of the deeds were disseized when they made the deeds, cannot avail her. The deed to the demandant from Gove, the purchaser at the tax sale, was made since the passage of the St. 1891, c. 354, which makes a conveyance of real estate as effectual to transfer the title when there is a disseizin or an adverse possession as if the grantor were in possession. We see no reason to doubt the constitutionality of this statute. This contention, therefore, cannot affect the tax title. Moreover, the judge was not bound to find, and it is at least doubtful whether he would have been warranted in finding, that there was a disseizin.

The demandant also shows another independent title to the whole of the property, and we do not intend to intimate that he could not safely rest his case upon it if it were necessary to do so. *Exceptions overruled.*

CITY OF BOSTON *vs.* ROCCO SARNI.

Suffolk. December 7, 1899. — March 1, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Furnace — Forge — Building Permit.

A forge in which a fire is maintained for the purpose of carrying on the ordinary business of a blacksmith is not a furnace within the meaning of St. 1892, c. 419, §§ 116, 117.

BILL IN EQUITY, to restrain the conveyance, maintenance, and occupation of a building until the same should be made to conform to the provisions of St. 1892, c. 419, §§ 116, 117, forbidding among other things the placing of a boiler or furnace in any building in the city of Boston without a permit. The case was submitted to the Superior Court, and, after the bill was dismissed, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

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S. M. Child, for the plaintiff.

No counsel appeared for the defendant.

LORING, J. The only question raised in this case is whether the word "furnace" as used in St. 1892, c. 419, §§ 116 and 117, includes a forge in which a fire is maintained for the purpose of carrying on the ordinary business of a blacksmith.

The difference between a forge and a furnace, so far as the ordinary use of those words in connection with metal work is concerned, is this: A furnace is used to melt ores in making metals, or to melt metals in working them; a forge is used to heat metals to hammer them into a desired form, not to melt them. It is evident that the Legislature thought that a fire used to melt ores and metals was dangerous, and that a fire used to heat them was not dangerous; and for that reason it forbade the erection of a furnace, but did not forbid the erection of a forge. *Decree dismissing bill affirmed.*

ALEXIS MENAGE *vs.* MAX ROSENTHAL.

Suffolk. December 7, 8, 1899. — March 1, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Contract of Employment — Custom — Evidence.

Where a written contract is plain, evidence of a custom which contradicts it is inadmissible, as is also evidence of the conduct of a party offered to aid in its construction.

In an action to recover salary from a certain date under a written contract, by which the defendant agreed to pay the plaintiff a certain sum weekly for his services as a travelling salesman, evidence from which it appears that the plaintiff had not, prior to such date, demanded more than one half of that sum during the preceding six months, is inadmissible on the ground that his refusal to continue travelling unless he was paid the weekly sum named in the contract was unreasonable.

If, in an action on a contract to recover compensation for services as a salesman, the defendant, on cross-examination, asks the plaintiff whether he has made the claim that the goods which he was trying to sell for the defendant were defective, and the plaintiff answers that he has made that claim in a certain conversation, and the plaintiff, on re-direct examination, asks the defendant whether the goods were defective or not, with a view of explaining his small sales, and the defendant testifies that they were defective, the plaintiff's answer to the

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defendant's question on cross-examination does not entitle the latter to put in the rest of the conversation, which is in itself inadmissible, and the plaintiff's question on re-direct examination does not make it competent or enlarge the defendant's right to introduce the conversation in evidence.

CONTRACT, to recover compensation alleged to be due under a written contract between the parties. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

E. N. Hill, for the plaintiff.

W. A. Buie, for the defendant.

LORING, J. This is an action brought by the plaintiff to recover from the defendant compensation for his services as a travelling salesman, at the rate of $100 a week, from the fourteenth day of October, 1896, until the first day of January, 1897, claimed to be due under a written contract by which the defendant employed the plaintiff as a travelling salesman in his business, and in which it was provided that the "service so to be rendered are [is] to be rendered by the party of the second part throughout the New England States of the United States."

One of the defences set up was that the plaintiff refused to go to New York, in compliance with the following request made by the defendant in a letter to the plaintiff dated October 19, 1896: "What we want you to do is to come to New York at once, as there is Eastern trade in town every day, and you could do better by staying here and waiting on them." On the next day the plaintiff, who was then in Providence, wrote in answer: "My contract with you provides that I shall render service in the New England States, and I am here waiting for you to fulfil your part of the contract, by sending me money for travelling expenses, so that I can continue to canvass for orders for your goods in the N. E. States. As I have notified you several times recently, I stand ready to carry out the terms of the contract and expect you to carry out your part of it, in all respects." By the terms of the written contract between the plaintiff and the defendant, the defendant was to pay the plaintiff's travelling expenses in addition to the sum of $100 a week. At the trial, the plaintiff introduced in evidence the record of a former suit brought by the plaintiff

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against the defendant to recover $100 a week from the beginning of the contract to October 14, 1896; from that record it appeared that a verdict was rendered for the plaintiff for the full amount of his claim, and that the jury, in answer to a question framed by the court, found that there was no agreement that the sum of $50 a week was to be paid in place of $100.

1. The plaintiff's exception to the evidence of custom introduced by the defendant must be sustained.

The defendant was allowed to introduce evidence of a custom in the business in which the plaintiff was employed by the defendant, namely, selling cloaks, for salesmen to take a trip at the end of January "and then come back and wait on the trade in New York," and then take a trip in the latter part of July and another in the latter part of September, and to be in New York "whenever trade is in town."

The contract in the case at bar provides, in terms which admit of no mistake, that the services to be rendered by the plaintiff are to be rendered in the New England States. The contract was not to employ the plaintiff as travelling salesman for the New England trade; it was to employ the plaintiff "as a travelling salesman," and to "render such service as a travelling salesman as the party of the first part may require, which service so to be rendered are [is] to be rendered by the party of the second part throughout the New England States of the United States." These provisions are in no way modified (as the defendant contends) by the general provisions of the second article, by which the plaintiff agreed to "give his entire and undivided attention to the sale of the goods manufactured by the party of the first part and to the business of the party of the first part." The purpose of that clause is to give the defendant the right to have all the plaintiff's time devoted to his business; it does not modify the explicit provisions of the first clause specifying where the plaintiff's services during that time are to be rendered.

This is not a case where the contract contains any word or words which have acquired in the trade of selling cloaks a trade meaning different from their ordinary meaning, as in *Mooney* v. *Howard Ins. Co.* 138 Mass. 375, cited by the defendant. Neither is this a case where the custom added an incident to

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the contract which is thereby tacitly contained therein. But this is a case where the effect of the custom is to directly contradict the provisions of the contract; the custom required the plaintiff to render a part of the services in New York which the contract provided should be rendered in the New England States; to allow such a custom to be put in evidence is not to interpret the contract which the parties have made, but to impose upon them a new contract which they have not made; it well may be that this contract was made to get rid of any question as to this custom, which the defendant and his daughter testified existed and which the plaintiff testified did not exist. A custom is admissible to explain a doubtful contract, but never to contradict a contract which is plain. *Dickinson* v. *Gay*, 7 Allen, 29, 34. *Brown* v. *Foster*, 113 Mass. 136. *Hedden* v. *Roberts*, 134 Mass. 38. *Benson* v. *Gray*, 154 Mass. 391, 394. *Partridge* v. *Phœnix Ins. Co.* 15 Wall. 573. *The Reeside*, 2 Sumn. 567. *Blackett* v. *Royal Exchange Assurance Co.* 2 Cr. & J. 244. *Phillips* v. *Briard*, 1 H. & N. 21. *Abbott* v. *Bates*, 45 L. J. C. P. 117.

2. The evidence of the plaintiff's conduct prior to October 14, 1896, which was admitted as showing that the true construction of the contract required the plaintiff to be in New York "whenever trade was in town," stands on the same footing; the conduct of parties is admissible to explain what is doubtful, never to contradict what is plain. In *Allen* v. *Kingsbury*, 16 Pick. 235, 239, *Clark* v. *Burt*, 4 Cush. 396, 399, and *Jenks* v. *Morgan*, 6 Gray, 448, 449, such evidence was held not to be admissible because the contract was plain. When the contract is plain it also has been held that the party's direct admission as to the proper interpretation of it is not admissible; *Paine* v. *M'Intier*, 1 Mass. 69; *Brockett* v. *Bartholomew*, 6 Met. 396; and in cases where the conduct of the parties under a contract has been admitted as evidence of the true interpretation of it, it has been admitted on the ground that the interpretation of the contract in question was doubtful. *Winchester* v. *Glazier*, 152 Mass. 316. *Reynolds* v. *Boston Rubber Co.* 160 Mass. 240, 245. *Crafts* v. *Hibbard*, 4 Met. 438. If the plaintiff in fact went to New York and waited on the trade when it was there, he did so voluntarily and not because this contract required him so

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to do, evidence of such voluntary acts is not admissible to add to, vary, or contradict his rights under the contract.

3. The plaintiff's exception to the introduction of the letters of June 7, June 14, and July 6 must be sustained.

By the previous suit between the plaintiff and the defendant, it was finally established that there was no arrangement made whereby the $100 a week was reduced to $50 a week. The defendant seeks to support the introduction of these letters, on the ground that, inasmuch as it appeared from these letters and other testimony that the plaintiff had not, prior to October 15, demanded more than $50 a week since the previous April, "his refusal to continue travelling unless he was paid $100 a week was unreasonable." However unreasonable it may have been (if it was unreasonable) for the plaintiff to insist that the defendant should pay him at the rate of $100 a week, as he had agreed to do, it was his legal right to insist thereon as a condition precedent to his continuing to perform his part of the agreement, even if theretofore he had only asked for $50 a week. The admission of this evidence is not consistent with the charge to the jury that the judgment in the previous suit determined that no change was made reducing the sum from $100 to $50.

4. The plaintiff's exception to the introduction of the conversation between the plaintiff, the defendant, and the defendant's daughter in April, 1896, must be sustained.

By the judgment in the prior suit, it was finally determined that there was no reduction from $100 to $50, as the defendant and his daughter testified was agreed upon in the conversation which took place in April, 1896. The testimony as to that conversation, therefore, was *prima facie* inadmissible. The defendant contends that it had been made admissible by the plaintiff, because the defendant, on cross-examination, had asked the plaintiff whether he had made the claim that the goods which he was trying to sell for the defendant were defective, to which the plaintiff had answered that he had made that claim, and that he had made it at the conversation in April, 1896; the plaintiff, on redirect examination, had asked the defendant whether the goods were in fact defective or not, with a view of explaining his small sales, and he testified that

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they were defective. The plaintiff's answer to the defendant's question on cross-examination did not entitle the defendant to put in the rest of the conversation of April, 1896, which was in itself inadmissible, and the plaintiff's question on redirect examination did not in any way make it competent or enlarge the rights of the defendant to introduce that conversation in evidence. If the plaintiff's testimony that he did make the claim that the goods were defective was material, the defendant and his daughter had the right to contradict him, but that statement of the plaintiff, in answer to a question put by the defendant on cross-examination, did not give the defendant the right to go further and testify at length to the rest of this conversation, which was in itself inadmissible.

The other exceptions raise questions which are not likely to arise on the new trial, and are not therefore considered by us.

Exceptions sustained.

CHARLES MILLER *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. December 11, 1899 — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Railroad — Master and Servant — Action.

If a railroad corporation furnishes for the use of its servants a sufficient supply of suitable links for connecting its cars, it is not bound to keep the links used in proper condition, or to prevent the use of dangerous and unsuitable links.

TORT, for personal injuries sustained by the plaintiff while in the defendant's employ as a brakeman. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. H. Benton, Jr. & C. F. Choate, Jr., for the defendant.

G. W. Anderson & S. A. Fuller, for the plaintiff.

MORTON, J. The plaintiff was head-end brakeman, and was standing on the car next to the engine, waiting to pass to the engineer signals from the rear end of the train, when the link

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connecting with the engine the car on which he stood, broke, causing the air brake to set, and bringing the train to a stop with a jerk which threw the plaintiff off and caused the injury complained of.

There was evidence tending to show that the plaintiff was in the exercise of due care and that the link had become worn and brittle from use. There was nothing to show whether the link had been originally furnished by the defendant, or whether it came from some other road. The undisputed testimony showed that the defendant furnished and kept on hand a suitable supply of links for the use of brakemen and conductors on freight trains, to which they had convenient access at all times, and that the brakemen and conductors were accustomed when they saw cracked or broken links, or links that were liable to break, to throw them out and replace them with others.

The court instructed the jury that if the link was one of those furnished by the defendant, "then it was the duty of the defendant to use proper care to furnish secure and proper links, and to keep them in such a condition that they should be proper and sufficient for work to be done by them"; and again that "it was the duty of the defendant to use reasonable care to provide suitable links and to prevent the use of unsuitable and dangerous links." If the link came from another road, then, the court instructed the jury, "the duty of the defendant corporation was not to provide a suitable link, and to do what was necessary to keep the coupling link in proper condition with the strength it ought to have for the purpose for which it was to be used, but it was the duty of inspection, inspecting the link in question by competent and proper persons."

The defendant duly objected, and excepted to the instructions thus given. It seems to us that the instructions went too far in requiring that the defendant should keep the links that it furnished in a proper condition to do the work for which they were furnished and should prevent the use of dangerous and unsuitable links. We think that in respect to the links which it furnished the defendant did its whole duty when it furnished a sufficient supply of suitable links, and that it was not bound to keep the links used in proper condition or to prevent the use

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of dangerous and unsuitable links. *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209. *McGee* v. *Boston Cordage Co.* 139 Mass. 445. *McKinnon* v. *Norcross*, 148 Mass. 533. *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13. *Carroll* v. *Western Union Telegraph Co.* 160 Mass. 152. *Allen* v. *Smith Iron Co.* 160 Mass. 557. *Young* v. *Boston & Maine Railroad*, 168 Mass. 219. *Ellsbury* v. *New York, New Haven, & Hartford Railroad*, 172 Mass. 130.

Since, for the reasons stated, the exceptions must be sustained, we do not deem it necessary to consider other questions that have been discussed, some or all of which may become immaterial on a new trial. *Exceptions sustained.*

SHERMAN L. WHIPPLE & another, assignees, *vs.* BENJAMIN F. DUTTON & others.

Suffolk. December 13, 1899. — March 1, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Pledge — Unauthorized Sale by Pledgee — Damages — Action.

An unauthorized sale of pledged property by the pledgee does not cause him to lose his lien and render him liable for the value of the property, if no damage is sustained by the pledgor.

TORT, by the assignees in insolvency of the estate of the Beacon Cycle Manufacturing Company, for the conversion of five hundred bicycles. Trial in the Superior Court, without a jury, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

During the years 1892 and 1893 the Beacon Cycle Manufacturing Company, a corporation, was engaged in Westborough in the manufacture and sale of bicycles. On June 26, 1893, the corporation entered into an agreement in writing with the defendants, which recited that the corporation had simultaneously delivered to the defendants five hundred "Nomad" bicycles for the purpose of securing money for its use as a corporation, and

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had executed and delivered therewith its three promissory notes, each for $4,166.67, of even date, payable in thirty, sixty, and ninety days from date, the amount of the notes being made up by calling each of the bicycles of the value of $25 each; that if the first note was paid, the defendants should release one third of the five hundred bicycles on being paid $26 for each bicycle, the amount of the note being payment so far as the bicycles released, but if the note was not paid, then one third of the bicycles should be the absolute property of the defendants; that if the second note was paid, another one third of the bicycles should be released on the payment of $27 a bicycle; and if the third note was paid, then the remainder of the bicycles should be released on the payment of $28 each therefor, but if each note was not paid, then such one third of the bicycles should be the absolute property of the defendants; and that the whole number of bicycles might be released at the maturity of the first note "by paying $26 for the whole number of the five hundred bicycles, the other two notes to be then given up."

The five hundred bicycles were not delivered to the defendants as recited in this agreement, and later the same day the corporation executed the following paper: "This instrument entitles Houghton & Dutton to the delivery to them of five hundred Nomad bicycles, the same being an accepted order for said number of machines to be delivered to them as they may request, as rapidly as one hundred and fifty per week; and this delivery is to be on the terms of our agreement with them dated June 26, 1893, and is hereby made a part thereof; said machines having been paid for in cash and agreements." Wheels to the number of three hundred and forty-four were delivered to the defendants in June and July, 1893, at various times, and as delivered the defendants advanced to or paid the corporation at the rate of $25 a wheel. The balance of the five hundred wheels was never delivered, and the last of the three notes mentioned in the agreement was not used by the defendants or presented for payment. The corporation did not pay the notes referred to in the agreement at their maturity, and has never paid the same or any part thereof, but on October 7, 1893, was declared insolvent by the court of insolvency for the county

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of Worcester upon a petition by one of its creditors, and on October 31, 1893, the plaintiffs were duly appointed assignees of the insolvent estate.

On October 12, 1893, the defendants began to sell the bicycles received under the agreements, at private sale and singly or in small lots, and all of them had been sold before June, 1894. The defendants did not serve any notice upon the corporation or upon the plaintiffs of an intention to sell; but the secretary of the corporation knew that sales were being made, and in general as to the price, and there was no evidence that he objected thereto. The sales were made openly at the large establishment of the defendants in Boston; and the bicycles were exhibited in the defendants' windows, where they were seen by an officer of the corporation.

It was not contended that the defendants did not use good judgment and diligence in effecting sales at favorable prices, the plaintiffs contending that the defendants had no right to sell at all.

In September, 1894, before the bringing of the writ, one of the plaintiffs called upon counsel for the defendants, to whom he had been referred by the defendants, and was informed that all the bicycles had been sold by the defendants, and that therefore they could not return them if demanded; and in reply to an inquiry whether a tender would be required, stated that it would do no good to make any demand or tender.

He further stated that upon failure of the corporation to pay its notes, he considered that the bicycles mentioned in the agreement became absolutely the property of the defendants; and that they recognized no rights of the assignees to recover the value of the goods. There was evidence that the bicycles were worth from $50 to $80 apiece.

The judge ruled, as requested by the defendants, that the plaintiffs were not entitled to recover, and found for the defendants; and the plaintiffs alleged exceptions.

W. R. Sears, for the plaintiffs.

E. A. Whitman, for the defendants.

MORTON, J. We assume, as the defendants contend, that the transactions of June 26 constituted a pledge of the bicycles received by the defendants, and that the subsequent sales as

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made by the defendants were unauthorized. But it does not follow that the plaintiffs are entitled to recover the value of the bicycles thus sold. The defendants had possession of the bicycles, and had a lien on them for sums lent to the bicycle company which were overdue and unpaid. They had a right to foreclose the pledge in any manner authorized by law. The plaintiffs contend that they foreclosed in a manner unauthorized by law. But the only effect, it seems to us, of the unauthorized sales by the defendants was to entitle the plaintiffs to recover any damages sustained thereby. The plaintiffs admit in substance that the defendants used good judgment and diligence in selling and that the sales were effected at favorable prices, and it does not appear that the proceeds were more than enough to pay what was due the defendants. Under such circumstances we fail to see how the plaintiffs have sustained any damage. It would be singular if, having a right to foreclose the pledge, the defendants should be held to have lost their lien and to be liable for the value of the bicycles, because, without inflicting any damage thereby on the pledgor, they went the wrong way about the foreclosure, or claimed a greater right than they actually had. We do not think that such is the law. See *Dahill* v. *Booker*, 140 Mass. 308; *Farrar* v. *Paine*, 173 Mass. 58 and cases cited; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; *Johnson* v. *Stear*, 15 C. B. (N. S.) 330.

Other questions have been raised and argued which, in consequence of the views expressed above, it does not seem to us necessary to consider.

Exceptions overruled.

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ALLEN P. ALDRICH & another *vs.* E. W. BLATCHFORD AND COMPANY.

Suffolk. January 8, 1900. — March 1, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Absent Defendant — Service — Foreign Corporation — Constitutional Law — Set-off of Judgments — Jurisdiction — Amendment.

Foreign corporations are within Pub. Sts. c. 164, §§ 2, 4, providing that the plaintiff in an action, who is not an inhabitant of or cannot be found within the Commonwealth, shall be held to answer to a cross action by the defendant, if the demands in the two cases are such that the judgments or executions can be set off against each other and that the writ in such cross action may be served on the person who appears as the attorney of the plaintiff in the original suit; and such provisions are constitutional.

That the cause of action in a cross action brought against a non-inhabitant under Pub. Sts. c. 164, § 2, was for unliquidated damages does not make the judgment recovered therein any the less proper for set-off against the judgment in the original action.

The refusal of the Superior Court to order a continuance under Pub. Sts. c. 164, § 5, of the original action brought by a non-inhabitant, where a cross action has been brought, is not an adjudication that the judgment when reached will not be proper to be set off, under § 2.

The fact that the claim in the original action brought by a non-inhabitant, where a cross action has been brought under Pub. Sts. c. 164, § 2, has been satisfied since the service of the writ in the cross action cannot affect the jurisdiction after it has attached.

It is not necessary that the writ in a cross action brought against a non-inhabitant under Pub. Sts. c. 164, § 2, should be served over again after an amendment showing that the mode of service adopted was justified by the facts.

MOTION to dismiss an action of tort in the Superior Court. The motion was denied; and the defendant appealed to this court. The facts appear in the opinion.

C. A. Jewell, for the defendant.

W. F. Kimball, for the plaintiffs, submitted the case on a brief.

HOLMES, C. J. This is an appeal from an order of the Superior Court denying the defendant's motion to dismiss the action on the ground that the defendant is a foreign corporation and that there has been no service upon it or attachment of its property. The service was made upon Mr. Charles A. Jewell as

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the defendant's attorney. If we may trust the defendant, for the slipshod papers do not give us the dates, this motion to dismiss followed, and the plaintiffs then amended their writ by inserting an allegation that the defendant was a foreign corporation and was plaintiff in a former action in the same court against the present plaintiffs, and that said Charles A. Jewell was the attorney of the plaintiff in the former suit. Afterwards this motion was brought up and was overruled.

It is provided by Pub. Sts. c. 164, § 2, that if a person who is not an inhabitant of this Commonwealth and who cannot be found here to be served with process, brings an action, he shall be held to answer to any action brought against him by the defendant, if the demands in the two cases are of such a nature that the judgments or executions can be set off against each other. It is further provided, by § 4, that the writ in the cross action may be served on the person who appears as the attorney of the plaintiff in the original suit. The plaintiff relies upon these provisions. The defendant denies that the act applies to foreign corporations, suggests that it is unconstitutional under the fourteenth amendment of the Constitution of the United States, that the judgments are not of a nature to be set off against each other, and sets up some other subordinate matters which we shall mention so far as necessary.

We see no reason to doubt that the act applies to foreign corporations. The grounds of convenience which led to the enactment are as strong in the case of corporations as when natural persons come here to sue, and the word "person" is sufficient to include them. Pub. Sts. c. 3, § 3, cl. 16.

We should have seen equally little reason to doubt the constitutionality of the act, were it not for a slight ambiguity in some of the expressions in *Dewey* v. *Des Moines*, 173 U. S. 193. In that case the plaintiff, a resident of Illinois, filed a petition to set aside certain assessments of land in Iowa belonging to him. A counter claim was set up for a sale of the land under the lien for the assessment, and also for a personal judgment. The Supreme Court of the United States held, very naturally, that the Iowa law, so far as it undertook to impose a liability upon a non-resident in excess of the benefit to his land, p. 201, or indeed a personal liability at all, pp. 202, 204, was invalid. That,

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as we understand the case, is all that is decided or intimated. It is said that "by resorting to the State court to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability." Of course he did not, because there was no such liability; but we do not understand the court to mean that where the liability exists, a plaintiff by resorting to the courts of a State may not consent to counter process which may result in a judgment. We do not understand the court to have had any such question in mind.

We need not refer to the often repeated assertion of the right of the States to determine the conditions upon which foreign corporations shall be permitted to do business within their jurisdiction. *Hooper* v. *California*, 155 U. S. 648, 652. *Commonwealth* v. *Nutting*, 175 Mass. 154. We come nearer to the case when foreign insurance companies are required by statute to appoint an attorney for the service of process. There is no doubt of the validity of such statutes. *Lafayette Ins. Co.* v. *French*, 18 How. 404. *St. Clair* v. *Cox*, 106 U. S. 350, 356. *Gillespie* v. *Commercial Ins. Co.* 12 Gray, 201. *Smith* v. *Mutual Ins. Co. of New York*, 14 Allen, 336, 340. *Johnston* v. *Trade Ins. Co.* 132 Mass. 432, 435. *Gibson* v. *Manufacturers' Ins. Co.* 144 Mass. 81. In the first of these cases it was held that jurisdiction was acquired by service on the resident agent of a foreign company, by force of a State law that such an agent making contracts within the State should also be deemed agent to receive service of process in suits founded upon such contracts. The Supreme Court, speaking through Mr. Justice Curtis, said that when the company sent its agent into the State with authority to make contracts of insurance, then it must be taken to assent to the condition upon which alone such business could be done there. So here. The foreign company by employing an attorney to begin an action against the defendant in Massachusetts, thereby assents to the attorney's receiving service in a counter suit, and gives him such powers as make the service sufficient. See further *Nations* v. *Johnson*, 24 How. 195.

We agree that the analogy which we have suggested is not perfect, but, if it is not sufficient, still we cannot bring ourselves

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to doubt the validity of the statute in question. If a State law provided that in all cases all cross demands should be open, an entirely possible piece of legislation, no one would doubt the constitutionality of the law. No service would be necessary in order to entitle the defendant to judgment if on a general taking of accounts he came out ahead. We do not suppose that the legislation would be any worse if it made service of a writ on the plaintiff's attorney a condition of the cross judgment. We do not perceive why the law would not be equally good if confined to foreigners suing in this State, the ground of the discrimination being obvious and reasonable.

The other objections may be dealt with very shortly. If the plaintiffs recover a judgment, that judgment will be for a definite sum, and is none the less proper for set-off that the cause of action was for unliquidated damages. Nothing appears on the record before us with regard to several matters touched in the plaintiffs' brief. If it be true as alleged that the Superior Court refused to order a continuance of the original action under § 5, that is not an adjudication that the judgment will not be proper to be set off when reached. Moreover, the decision may have gone on grounds having nothing to do with the question. If it be true as alleged that the claim in the original action has been satisfied since the service of the cross writ, the fact cannot affect the jurisdiction after it has attached. The writ did not need to be served over again after the amendment showing that the mode of service adopted was justified by the facts. See *Converse* v. *Damariscotta Bank*, 15 Maine, 431; *Hearsey* v. *Bradbury*, 9 Mass. 95; *Hart* v. *Waitt*, 3 Allen, 533. The justification lay in the facts, not in the allegation of the facts, and the allegation was necessary, if at all, only to show on the face of the record that the case was within the statute.

Motion denied.

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GIOVANNI BERRY *vs.* MEHITABLE GATES.

Middlesex. January 8, 1900. — March 1, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Levy — Officer's Return — Judgment — Omission to credit Payments thereon — Validity of Execution and Sale.

It is not essential to the validity of an officer's return upon an execution levied on real estate standing in the name of another, that the word "fraudulently" should be inserted therein.

The omission to credit on a judgment certain sums received thereon does not render an execution taken out on the judgment null and void, or a sale thereunder invalid, if such omission was not fraudulent.

WRIT OF ENTRY, to recover certain parcels of land in Framingham. At the trial in the Superior Court, before *Hardy*, J., the jury returned a verdict for the demandant; and the tenant alleged exceptions, which appear in the opinion.

H. Dudley, for the tenant.

C. F. Choate, Jr., for the demandant.

LATHROP, J. The tenant allowed to go in without objection the officer's return, and the next morning attempted to save his rights by objecting that the return did not show that the levy of the execution was made upon land fraudulently standing in the name of another. It would seem that no exception was seasonably taken. *Peterson* v. *Farnum*, 121 Mass. 476. We need not, however, discuss this question, for the question of the validity of the return is raised by the first request for instructions. This request is as follows: "If the jury find that the demanded premises were not levied on as 'fraudulently standing in the name of a person other than the debtor,' then the demandant cannot take advantage of the Pub. Sts. c. 172, §§ 1, 49, and the verdict must be for the tenant."

The return of the officer states, in the beginning, that he "seized and took all the right, title, and interest which the within named John R. Rooke has in and to the following described parcels of real estate, the record or legal title to which stands in the name of Mehitable Gates."

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If the word "fraudulently" had been inserted before the word "stands," the objection of the tenant would have been met. But there is nothing in the statutes which requires the officer to state in his return that the title fraudulently stands in the name of another. See Pub. Sts. c. 172, §§ 1, 4, 28, 49.

So far as we are aware, it has not been customary in this Commonwealth to insert the word "fraudulently" either in an attachment of real estate standing in the name of another, or in the return of the officer upon a levy on an execution. See *Woodward* v. *Sartwell*, 129 Mass. 210; *Cowles* v. *Dickinson*, 140 Mass. 373. The practice in Suffolk County, where levies on real estate are numerous, is not to insert the word "fraudulently."

We see no ground for holding that the first request for instructions should have been given.

The second request for instructions was as follows: "If the jury find that the levy of execution on land of the tenant was made by the officer on an execution the amount whereof was for a larger sum than the amount justly due thereon, then the levy and sale were null and void, and the jury should find for the tenant." This request was based on an offer of proof made by the tenant, after it appeared that the amount of the judgment was $1,729.88, damages, and $39.62, costs of suit, and that afterwards execution issued for $1,629.50, and after the demandant had testified on cross-examination that he proved his judgment against Rooke in insolvency, and received dividends, the amount of which he stated, but which is not stated in the bill of exceptions. The offer of proof is thus stated: "The tenant offered evidence tending to show how large a claim the demandant proved in insolvency, especially that he proved the amount of said judgment which was then unsatisfied; such evidence tending to show also the amount of the dividends received by the demandant on his said proof, the tenant claiming it was for the purpose of showing what the amount of the judgment was, and that the demandant had received payment on account of said judgment which he did not credit thereon when he took out the execution on which the tenant's property was sold."

The bill of exceptions further states that the evidence offered was the demandant's proof of claim (which contained a copy

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of said judgment) in the insolvency court in Rooke's case, also the assignee's petition to expunge the demandant's claim, and a certified copy of the order of distribution. This, the tenant contended, would tend, if admitted, to show that the demandant had not allowed substantial credits on the judgment, amounting to "sundry hundreds of dollars, and that at said sale on execution the amount required to satisfy the same was so much larger than the amount which in fact was due thereon." This evidence was excluded, and the tenant excepted.

It is obvious at the outset that the tenant does not seek to go behind the judgment, so that the question whether and to what extent a tenant in a writ of entry can attack collaterally the judgment recovered against his fraudulent grantor does not arise. See *Inman* v. *Mead*, 97 Mass. 310, 314; *Peterson* v. *Farnum*, 121 Mass. 476, 481, 484.

The demandant having obtained a valid judgment, the question is whether the fact that he omitted to credit on the judgment certain sums received thereon, renders the execution taken out on the judgment null and void, and the sale thereunder invalid, there being no offer to show that the omission to make the proper credit was fraudulent.

There was evidence in the case that Rooke, at the time he made the conveyance to his wife through a third person, could not pay his obligations as they matured, and that the conveyance was made with the purpose and intent of hindering, defrauding, and delaying his creditors; that his condition and intent were known to his wife and to the tenant, to whom the wife subsequently conveyed the property; and that no consideration in fact passed between the parties. The tenant therefore does not stand in the position of a purchaser in good faith; and unless it is true that an execution taken out without fraud, for an amount greater than is really due on the judgment, is void, her exceptions must be overruled.

While there is some conflict on this question, the weight of authority is in favor of the view that an execution which issues upon a judgment in an action, although it erroneously states the amount of the judgment, is amendable, and is therefore voidable only, and not void, and that a sale under it is valid, even if it is not amended. *Walker* v. *McKnight*, 15 B. Mon. (Ky.) 467.

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no event can the plaintiff recover more than nominal damages. 3. In no event can the plaintiff recover more than a fair market value of the property converted."

The judge submitted issues to the jury, which, with the answers returned, were as follows:

"1. Is the plaintiff entitled to hold the defendant for a conversion of the pamphlets? *A.* Yes. — 2. What was the value of the pamphlets to the plaintiff, irrespective of any special value for advertising or other purposes? *A.* $5.00. — 3. What was the total value of these pamphlets to the plaintiff, including with the value as found in answer to the second interrogatory, also any special value which these pamphlets had to the plaintiff? *A.* $71.25."

The defendant admitted that if, on the facts above stated, the plaintiff was the owner of the eighty pamphlets sued for, and was also entitled to their possession, the evidence showed a conversion; whereupon the judge ruled that the plaintiff was so entitled, to which ruling the defendant excepted; and the judge instructed the jury to answer the first interrogatory in the affirmative.

After the jury had returned their answers to these interrogatories, the plaintiff not contending that the pamphlets had any other special value to him than their value for advertising purposes, the judge ordered the jury to return a general verdict for the plaintiff in the sum of $5.

To the rulings and refusals to rule, so far as inconsistent with the requests made, both the plaintiff and the defendant excepted. If, on the facts stated, the plaintiff had no right of possession, judgment was to be entered for the defendant. If the first request of the plaintiff should have been given, judgment was to be entered for the plaintiff for $71.25; otherwise, judgment was to be entered on the verdict as rendered.

G. W. Anderson, for the plaintiff.

E. K. Hall, for the defendant.

BARKER, J. Upon the facts stated in the report there should have been judgment for the defendant.

The contract for making the dies and the contract for manufacturing five thousand folders by printing impressions from the dies were separate. The fact that the dies never had been in

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the actual possession of the defendant is immaterial to the present question. They were representations of the defendant's own monuments, made from drawings or photographs furnished by himself. The plaintiff had no right to use the dies to have impressions of them printed for his own use, and his use of them in having eighty extra copies of the folder struck off for himself, for the purpose of advertising his own business of making dies, was a breach of trust toward the defendant, which would have entitled the latter to have, at least if the matter were of sufficient consequence, an injunction to restrain the plaintiff from using the folders thus wrongfully obtained, and to a decree ordering them to be destroyed. *Morison* v. *Moat*, 9 Hare, 241. *Prince Albert* v. *Strange*, 2 DeG. & Sm. 652; 1 MacN. & G. 25. *Tuck* v. *Priester*, 19 Q. B. D. 629. *Pollard* v. *Photographic Co.* 40 Ch. D. 345.

Assuming, without so deciding, that title to eighty of the folders as between the printer and the plaintiff passed to the plaintiff before or at the time when the five thousand and eighty folders were delivered to the defendant, he still cannot recover in this action, because by his own fraudulent act in procuring them to be made for his own use, in breach of the trust reposed in him by the defendant to make no such use of the dies, the plaintiff has caused the eighty folders to be so mixed and confused with the defendant's goods that they cannot be distinguished, and the plaintiff cannot require the defendant to separate the eighty folders from his own, or to pay the plaintiff for their value. They were not ear-marked and there was no way to distinguish them, and the confusion of them with the other five thousand was due to the plaintiff's attempt to defraud the defendant. *Ryder* v. *Hathaway*, 21 Pick. 298, 304. See *Willard* v. *Rice*, 11 Met. 493; *Smith* v. *Sanborn*, 6 Gray, 134; *Stearns* v. *Herrick*, 132 Mass. 114; *Moors* v. *Reading*, 167 Mass. 322, 326.

Judgment to be entered for the defendant, notwithstanding the verdict.

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JOHN F. SLATTERY *vs.* NORTH END SAVINGS BANK.

Suffolk. November 14, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Authority of President and Treasurer of Savings Bank to make Building Loan — Action — Estoppel.

The president and treasurer of a savings bank, in the absence of a by-law or vote of the trustees, have no authority to purchase or contract in the name of the bank for work and material to be furnished in completing buildings on land subject to a building-loan mortgage; and the bank is not estopped, in an action against it for materials furnished, to deny the debt, although the transaction took the form of a sale of the materials to the bank.

CONTRACT, upon an account annexed, for building materials. Trial in the Superior Court, before *Bell*, J., who ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

R. W. Nason, for the plaintiff.

C. Hunneman, for the defendant.

BARKER, J. The verdict for the defendant was ordered upon the evidence introduced by the plaintiff.

In considering whether the order was right, all facts must be treated as proved which tend to support the action and which can be inferred fairly from the evidence. It tended to prove that the defendant had taken from one Lord a mortgage of land upon which Lord was building some dwelling-houses which, by the understanding between himself and the defendant, he was to complete, and that the defendant had made to Lord upon the mortgage of the land a loan, of which a large amount was retained by the lender, to be applied by it under the direction of Lord in paying for the work and materials which should be used in the completion of the houses. In other words, the defendant had made what is commonly termed a building loan to Lord, and so had his money in its hands upon the trust to apply it so far as might be necessary under his direction toward the completion of the houses.

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The evidence would also justify a finding that the president and the treasurer of the defendant were its executive officers, clothed with authority to transact such business for it as came within the lines of its usual and ordinary business of investing its funds. Also that the goods for the price of which the plaintiff sues were sold to the defendant acting through its president and treasurer for the purpose of being used in the completion of the buildings, and were in fact so used, and that the arrangement that they should be so sold and used, and should be paid for upon the completion of the buildings, by the bank, and out of Lord's money in the bank's hands, was fairly made by and between Lord, the plaintiff, and the bank's president and treasurer, and that the prices of the goods so furnished and used in the building of the houses were fair, and that the plaintiff has not been paid. There was no evidence of the extent of the authority committed to the president and treasurer except that they were apparently in charge of the bank's business at its banking-house. No vote of the trustees nor any by-laws were in evidence, nor was it shown that the bank had used its executive officers to act for it in such matters of business as might arise in connection with building loans. All the evidence related to this single transaction.

If the circumstances which the evidence tended to prove were facts, it seems very harsh to hold that the plaintiff cannot recover of the bank. If a savings bank can make a building loan, such transactions as that between the bank, Lord, and the plaintiff in the present case are a legitimate result of the situation. By a fair arrangement, into which the usual executive officers of the bank purport to bring it, the three parties interested agree that the money of the mortgagor, intrusted to the mortgagee for the purpose of securing the completion of the building on the mortgaged land, shall be applied to that end, by way of a sale of materials to one who furnishes them to go into the building, and of an agreement, in which both mortgagor and mortgagee join, that the latter shall pay the bill out of the mortgagor's money in the mortgagee's hands. The bargain is fair to all parties, and the money to be paid for the materials is the money of the mortgagor.

But, for wise reasons, the powers which the executive officers of savings banks and like institutions have, merely by virtue

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of their offices, unenlarged by by-laws or by votes of the trustees, are very strictly limited. If a savings bank should commonly make building loans, it might well be that it would put upon some member of its board of investment, rather than upon its executive officers, the duty of seeing that the money of the mortgagor retained to ensure the completion of the building should be so applied.

In the absence of any evidence of the authority of the president and treasurer other than that which may be inferred from the offices which they held, we are of opinion that the present case is governed by the decision in *Jewett* v. *West Somerville Co-operative Bank*, 173 Mass. 54, in which the authority of the treasurers of such institutions and of savings banks has been discussed recently. In that case it was held that, assuming that the bank could have bound itself by the acceptance of an order given for materials to be used in the completion of a building on which the bank had a building loan, its treasurer could not bind the bank by such an acceptance without express authority from the corporation, and that no action could be maintained against the bank upon an acceptance so given. The purchase of materials to go into the construction of the building is farther removed from banking than the acceptance of an order for the payment of money in the hands of the bank, and to be disbursed for a purpose for which the order was given and accepted. If the treasurer, by virtue of his office, could not bind the bank by the acceptance of such an order, he could not make it the purchaser of the materials by buying them in its name.

The final contention of the plaintiff is that the defendant is estopped to deny the debt. In the first place the very restricted authority of the merely executive officers of a savings bank is part of the policy of our law, which confines the business of such banks within very narrow limits. See *Bradlee* v. *Warren Fire Cents Savings Bank*, 127 Mass. 107; *Jewett* v. *West Somerville Co-operative Bank*, *ubi supra*. If the materials had been purchased for the construction of a banking-house for the accommodation of the business of the bank, or for the necessary repair of a building upon land the title to which the bank had acquired in the legitimate course of its business, it might not offend public

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policy to hold the bank estopped to deny that it was bound by the purchase. But to go farther would infringe the policy of our law. Again, the transaction was so far out of the ordinary business of a savings bank that the plaintiff was reasonably put upon inquiry as to the authority of the president and treasurer to make the purchase. Finally, while the transaction took the form of a sale to the bank, it was understood by all parties that the materials were to be at once made part of a building which belonged to Lord, and not to the bank; and the arrangement, while consistent with the interest of the bank, was primarily for the benefit of Lord, and not essential to the protection of the bank. It is to be assumed that if Lord could not complete the building, the mortgage was a sufficient security for the money actually advanced upon it up to the time when the arrangement was made. We are of opinion that the case does not call for the application of the doctrine of estoppel.

Exceptions overruled.

JOSEPH L. VONDAL *vs.* ROSANNA VONDAL.

Suffolk. November 16, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Libel — Nullity of Marriage.

The concealed existence of a venereal disease known as "syphilis," in one of the parties to a marriage which has been consummated, is not a sufficient ground for a decree of nullity of marriage.

LIBEL, for a sentence of nullity of marriage. Trial in the Superior Court, before *Fessenden*, J., who ruled that the libel could not be maintained, and entered a decree dismissing the same; and the libellant alleged exceptions, which appear in the opinion.

C. W. Cushing, for the libellant.

J. F. Kilton, for the libellee.

BARKER, J. Although at the time of her marriage the libellee was afflicted with syphilis, and knew of her disease and

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concealed it from the libellant, the disease at that time was probably not contagious, and could have been so treated that it would not be communicated by contagion, and so as probably to make her free from suffering any ill effects from the disease. It is to be presumed that she could bear children, although her offspring would probably have been affected by the disease. The marriage was followed by cohabitation for four months, and, consummation must be presumed.

As was plainly intimated in *Smith* v. *Smith*, 171 Mass. 404, 410, the concealed existence of venereal disease of such a character, in one of the parties to a marriage which has been consummated, is not a sufficient ground for a decree of nullity of marriage. *Exceptions overruled.*

JAMES V. DEVINE *vs.* MARY E. LORD.

Suffolk. November 16, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Eminent Domain — Order laying out Way — Statute — Easement — Tenant at Sufferance — Deed — Estoppel.

The street commissioners of Boston ordered that a certain highway be widened and laid out under the provisions of statutes named, including St. 1897, c. 394, over certain streets and private lands described from one park to another park as a public way; and that, under the authority conferred by St. 1894, c. 324, certain parts of the way be reserved for the use of street railways, and for trees, grass, and planting; and designated certain described parts of the way to be under the authority of the park commissioners of the city as a parkway, subject to the reservation made under St. 1894, c. 324, as above stated. *Held*, that an easement only, and not the fee, in the lands described was taken under the order.

Where an easement only in land is taken by the right of eminent domain, a tenant of the premises who, after the expiration of his lease, remains in occupation is liable as a tenant at sufferance to the owner of the fee.

If a street is laid out by an order of the street commissioners of a city over certain land as a public way, and several months afterwards the owner conveys the land in fee to the city by a deed which recites that the land was taken by the order to lay out the way, and that the consideration of the deed was in full satisfaction and discharge of all claims and demands by reason of such taking, the fee does not pass from the owner until the delivery of the deed, and he is not estopped by anything therein to assert that fact as against a tenant of the premises who remains in occupation until such conveyance.

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CONTRACT, for use and occupation of a store on Columbia Street in Boston from October 1, 1897, to April 1, 1898. Trial in the Superior Court, before *Braley*, J., who allowed a bill of exceptions, in substance as follows.

The defendant had been in possession of the premises under a lease from the plaintiff which expired on October 1, 1897; and thereafter he continued to hold over. The street commissioners on May 28, 1897, ordered that due notice be given that the board was of the opinion that "the public necessity and convenience require that Columbia Street . . . be widened and laid out over parts of" certain ways, "and private lands from Franklin Park to the Marine Park, as a public way to be known as Columbia Road, . . . and that a part, or parts, of said public way be designated as a parkway, substantially as shown on a plan of said highway in the office of" the board; and that they intended "to take the action so required under the provisions of" St. 1891, c. 323, "and acts in amendment or addition thereto, and of" St. 1897, c. 394; and they appointed a time and place for a hearing in the matter.

On August 31, 1897, the board passed an order, which, after reciting that a public hearing had been had in the matter, determined that the public necessity and convenience required, and ordered, "that the said highway be" widened and laid out under the provisions of the statutes named in the order of May 28, over the streets and private lands thereinafter described from Franklin Park to the Marine Park, "as a public way to be known as Columbia Road," according to a certain plan therein described. Then followed a detailed description of the road as thus widened and laid out. Then under the authority conferred by St. 1894, c. 324, the board ordered certain parts of the way to be reserved for the use of street railways and for trees, grass, and planting. The order further proceeded as follows: "And this board designate the following described parts of said Columbia Road to be under the authority of the Board of Park Commissioners of the city of Boston as a parkway, subject to the reservation aforesaid." This was followed by a description of the parts to be placed under the control of the park commissioners. The entire premises of the plaintiff were taken as a part of such territory; and on or about September 9, 1897, a

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notice to quit from the board of street commissioners was given the plaintiff. On or about October 1, 1897, the defendant received from the city of Boston a notice to quit. The defendant refused after the expiration of the lease on October 1, 1897, to pay the plaintiff rent, and remained in possession. The city of Boston on or about September 9, 1897, entered upon a part of the territory taken under the above named order, but not of any portion of the occupied premises. The mayor and street commissioners were present, and a building was torn down and some work on the earth was done; and on October 2, 1897, another entry was made by the city, and excavating and blasting was done, and continued on that part of the territory taken under the order near Blue Hill Avenue. On or about January 21, 1898, work was commenced near that part of the territory taken by the order which the defendant occupied; and on April 1, 1898, the defendant vacated the premises, and shortly after the plaintiff, at the request of the city, removed his building from the land.

The city was ready and offered to pay for the premises of the plaintiff so taken by the order immediately after the taking; but there was a dispute as to the amount which the plaintiff should receive for his premises, and that dispute continued to about April 1, 1898, when the city and the plaintiff agreed, and he executed and delivered to the city a deed of the premises in fee, which contained the following recital: "The above granted premises were taken by a Resolve and Order of the Board of Street Commissioners of the said city of Boston, to lay out Columbia Road, passed August 31, A. D. 1897, reference to which is hereby had, and are to be used for the purposes of a public street of said city of Boston; and the above consideration has been received in full satisfaction and discharge of all claims and demands for damages, costs, expenses, and compensation by reason of said taking."

The defendant requested the judge to instruct the jury as follows: "1 Upon all the evidence the plaintiff is not entitled to recover. 2. By the order of August 31, 1897, under the statute of 1897, the city of Boston acquired a fee in the premises taken, and the plaintiff's estate was thereby terminated. 3. The taking by the city on August 31, 1897, and the entry of the

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city of September 9, 1897, October 1, 1897, and January 21, 1898, and the work commenced by the city upon parts of the territory taken under said order, of which the premises of the plaintiff was a part, were such an entry and possession as would terminate the estate of the plaintiff. 4. Payment to the plaintiff by the city of the value of his premises by reason of said taking would prevent the plaintiff from recovering in this action, notwithstanding the plaintiff did not receive the money for some time after said taking. 5. By the terms of the deed of the plaintiff of the premises to the city, the title in fee, stated in said deed, related back to the time of the taking in August, 1897. 6. The plaintiff is estopped by the declaration in his deed to claim title after August 31, 1897." The judge refused to give the instructions requested.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

E. O. Cooke, for the defendant.

J. A. Collins, for the plaintiff.

HAMMOND, J. If by the order of August 31, 1897, the fee of the plaintiff's land was taken, this action cannot be maintained, even if there was no eviction by or attornment to the city. *O'Brien* v. *Ball*, 119 Mass. 28. The first question, therefore, is whether the fee was taken. On May 28, 1897, the street commissioners gave notice that they were of the opinion that "the public necessity and convenience require that Columbia Street . . . be widened and laid out over parts of" certain ways "and private lands from Franklin Park to the Marine Park, as a public way to be known as Columbia Road, . . . and that a part, or parts, of said public way be designated as a parkway, substantially as shown on a plan of said highway in the office of" the board; and that they intended "to take the action so required, under the provisions of" St. 1891, c. 323, and "acts in amendment or addition thereto," and of St. 1897, c. 394; and they appointed a time and place for a hearing.

The order of August 31, 1897, after reciting that a public hearing had been had on the matter, determined that the public necessity and convenience required, and the board ordered, that the said highway be widened and laid out under the pro-

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visions of the statutes named in the notice of May 28, over the streets and private lands thereinafter described from Franklin Park to Marine Park, "as a public way to be known as Columbia Road," according to a certain plan therein described.

Then follows a detailed description of the road as thus widened and laid out.

Then, under the authority conferred by St. 1894, c. 324, certain parts of the way are reserved for the use of street railways, and for trees, grass, and planting. The order further proceeds as follows: "And this board designate the following described parts of said Columbia Road to be under the authority of the Board of Park Commissioners of the city of Boston as a parkway, subject to the reservation" made under St. 1894, c. 324, as above stated. Then follows a description of the parts to be placed under the control of the park commissioners.

The order was an order to lay out a public way, and on familiar principles it took simply an easement, unless there is something peculiar in the statutes under which the board acted showing a different result.

St. 1897, c. 394, simply authorized the street commissioners acting under St. 1891, c. 323, to lay out a public way over public ways and private lands from Franklin Park to Marine Park. Section 2 provides that certain parts of the way may be placed in the charge and control of the park commissioners. Section 3 provides that the cost of so much of the way as is to be under the charge and control of the park commissioners shall be considered as expenditures for public park purposes.

St. 1891, c. 323, makes certain provisions concerning the laying out, altering, and widening of streets in the city of Boston, but it does not change in any respect the nature of the easement taken; and it need not be further considered except to say that in certain respects it had restricted the powers of the street commissioners over the grade, etc., of certain proposed streets, and one of the purposes of St. 1897, c. 394, undoubtedly was to remove those restrictions as to this way.

The defendant relies upon the second section of St. 1897, c. 394, which is as follows: "Said board may designate a certain part or parts of said public way to be under the charge

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of the board of park commissioners of said city as a parkway, and said board of park commissioners shall, after the construction thereof, have the charge and control of such parkway, as if the same had been placed in its charge under the provisions of chapter three hundred of the acts of the year eighteen hundred and ninety-three." She contends that the effect of that section is to take from the landowner the fee of so much of the way as is designated to be under the charge of the park commissioners. It does not appear that the plaintiff's land was within that part, but as the argument upon both sides assumed that it was, we so assume in the consideration of the case.

St. 1893, c. 300, § 1, provides that any board of park commissioners established under the authority of St. 1882, c. 154, as amended by St. 1890, c. 240, or of any special act, may "connect any public park, boulevard, or driveway under its control, with any part of any city or town in this Commonwealth wherein it has jurisdiction, by selecting and taking any connecting street or streets, or part thereof, leading to such park, and shall also have power to accept and add to any such park any street or part thereof which adjoins and runs parallel with any boundary line of the same: provided, that the consent of the public authorities having control of any such street or streets so far as selected and taken, and also the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on such street or streets so far as taken, shall be first obtained." Section 2 provides that they may improve such "streets as they may deem best," and may levy a betterment assessment. Section 3 is as follows: "Such boards of park commissioners shall have the same power and control over the streets or parts of streets taken under this act as are or may be by law vested in them concerning the parks, boulevards, or driveways under their control." Section 4 provides that when any street passes out of the control of the commissioners it shall revert to the proper corporate authorities of the municipality.

By referring to St. 1882, c. 154, it will be found that by § 3 authority is given the commissioners to take land in fee for a public park, to lay out and improve the park, to make rules for the use thereof, with power to affix penalties for breach thereof, and generally to do all acts needful for the proper exe-

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cution of powers or duties granted to and imposed upon towns in these matters, provided that no land shall be taken or expense incurred until an appropriation is made by the town. And St. 1875, c. 185, the act establishing the park commissioners of Boston, has similar provisions.

Without deciding whether there is a taking of the fee of the land in the streets selected and taken under St. 1893, c. 300, we are of opinion that there was no taking of the fee in those parts of Columbia Road designated under the order of August 31, 1897, laying out this road. It is an order to lay out a street, passed by the street commissioners, the board vested with the general power to lay out streets. It is certain that under the order there was no taking of the fee of the parts not under the charge of the park commissioners. Nor do the park commissioners have anything whatever to do with the parts designated for them until after construction. After the street is laid out and constructed it is placed under their charge and control for purposes of repair and supervision.

Bearing in mind the rules of construction applicable to statutes authorizing the taking of private property, that the authority to take a fee must clearly appear either expressly or by fair implication, and that this was a taking for a highway, and that the provisions of the second section of St. 1897 may fairly be taken to mean simply that the park commissioners were to see to the care of the road, we think that only an easement was taken, and that the first request was rightly refused.

The defendant was not evicted, but enjoyed the premises until April 1, 1898. Inasmuch as the fee was not taken, the plaintiff remained the owner of the fee, and the defendant, remaining in occupation, was liable as a tenant at sufferance. *Emmes* v. *Feeley*, 132 Mass. 346. Pub. Sts. c. 121, § 3. It was of no consequence that elsewhere on the line somebody else might have been disturbed or evicted. That the fee did not pass from the plaintiff until the delivery of the deed, and that the plaintiff is not estopped by anything in his deed to assert the fact as against this defendant, is too plain for discussion.

Exceptions overruled.

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JEREMIAH D. COGAN *vs.* LAMONT G. BURNHAM.

Suffolk. November 17, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Incapacity to give Notice of Injury — Employers' Liability Act — Negligence — Action.

In an action under the employers' liability act, St. 1887, c. 270, for personal injuries, the jury are rightly instructed that the plaintiff was not excused from giving the notice required by § 3 of that statute, as amended by St. 1888, c. 155, § 1, unless he was both mentally and physically disabled.

An action cannot be maintained at common law for personal injuries sustained by the plaintiff while engaged, with others employed by the defendant, in taking down a coal run composed of a series of trestles about twenty feet high, having uprights and top and cross pieces of heavy timbers, the base resting upon the ground, and fastened together at the top by stringers on which two thicknesses of heavy planking were laid crosswise and spiked down, if the accident, which happened when the first trestle was being lowered to the ground, was caused primarily by the fellow workmen of the plaintiff negligently taking down the trestle as a whole, instead of separating it and taking it down in sections.

If in lowering so large a structure a heavy piece of timber should have been planted in the ground to hold the end of the rope by which the structure was lowered, the burden is on the plaintiff to prove that no such piece of timber was on the premises. Since the necessity for such a piece of timber arises from a temporary condition during the progress of the work caused by the negligence of fellow workmen in the way in which they lowered the structure, the defendant does not owe the plaintiff any duty to provide for it.

TORT, for personal injuries occasioned to the plaintiff while engaged with others in the defendant's employ in taking down a coal run. The declaration contained two counts under the employers' liability act, St. 1887, c. 270, and three counts at common law.

At the trial in the Superior Court, before *Sherman*, J., the question whether the plaintiff, who did not give notice of the injury within the time required by the statute, was incapacitated from giving the notice until he did, was submitted to the jury under instructions which were excepted to by the plaintiff; and the jury answered it in the negative. Thereupon the judge directed the jury to return a verdict for the defendant on the common law counts; and, at the plaintiff's request, reported the case for the determination of this court. If there was error, a

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new trial was to be granted; otherwise, judgment was to be entered on the verdict. The facts appear in the opinion.

J. E. Hanly, for the plaintiff, submitted the case on a brief.

J. Lowell & S. H. Smith, for the defendant.

LORING, J. The exceptions must be overruled.

1. The jury were rightly instructed as to what would excuse the plaintiff from giving the notice required by St. 1887, c. 270, § 3, as amended by St. 1888, c. 155, § 1, to charge the defendant on the counts drawn under the employers' liability act. There is nothing in his contention that the ruling was wrong because the statute excuses the employee from giving notice either in case of his mental, or in case of physical disability, while the judge ruled that the plaintiff was not excused unless he was both mentally and physically disabled. If a person is physically incapacitated from giving the notice personally, but is able to give the notice through others and mentally capable of so doing, it is not a case where, within the language of St. 1888, c. 155, § 1, from physical or mental incapacity, "it is impossible for the person injured to give the notice within the time provided in said section." *Lyons* v. *Cambridge*, 132 Mass. 534. *May* v. *Boston*, 150 Mass. 517. *Saunders* v. *Boston*, 167 Mass. 595.

2. The ruling of the judge was right that there was no evidence on which the plaintiff could recover on the common law counts.

The plaintiff was engaged, with others employed by the defendant, in taking down a coal run on the defendant's premises. The coal run was made up of a series of trestles some twenty feet in height; the upright timbers of these trestles and the top and bottom cross pieces were made of timbers 10 × 10 inches in size; the base of the trestles rested upon the ground, and they were fastened together at the top by eight stringers of "smaller dimensions"; on these stringers were two thicknesses of heavy planking laid crosswise and spiked down. The plaintiff was injured while the first trestle was being lowered to the ground in the following way: before the lowering began, all the planking on the coal run was removed; four of the eight stringers were then removed; whether four of the eight stringers had been removed [illegible] run throughout its entire length, or four of the

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eight stringers between the first and second trestles only, was left in doubt; one witness testified to the former and another testified to the latter. After this had been done, one of the employees, Moffet by name, fastened a rope around the top cross piece of the first trestle, and, after passing it once around the top cross piece of the second trestle, threw the end to the plaintiff, who was on the ground; Moffet then "removed the remaining stringers between the first and second trestles, then descended to the ground, knocked out the support and pushed trestles, and taking the rope from the hands of the plaintiff proceeded to pay out the rope, increasing the distance between the top of the first trestle and the second trestle, thereby lowering the first trestle on an incline, or canting it down." When the top of the first trestle had reached to within three or four feet of the ground, the strain on the second trestle and the trestles and stringers back of it was so great that "the support gave way, and the second trestle and other trestles and timbers connected therewith fell," causing the injury in question. The "undisputed testimony showed that the plaintiff was standing under the second trestle, and when Moffet took the rope, he, the plaintiff, started to walk away, when the trestle above him gave way and the timbers fell upon him."

It is plain that the injury was caused by the negligence of fellow workmen, and that there was no evidence on which the jury could find that the defendant was negligent.

The accident was primarily caused by the fellow workmen of the plaintiff taking down the trestle as a whole, instead of separating it and taking it down in sections; and this disposes of the plaintiff's contention that on the evidence the jury were warranted in finding that in lowering so large a structure it is negligent not to plant a large piece of timber in the ground to hold the end of the rope by which the structure is being lowered. The necessity for such a piece of timber to be used in the way indicated arose from a temporary condition during the progress of the work, caused by the negligence of fellow workmen in the way they adopted of doing the defendant's work, and was not necessarily an incident of that work; for the lack of appliances arising from such a temporary condition in the progress of the work the defendant is not liable. *Whittaker* v.

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Bent, 167 Mass. 588. In addition, the plaintiff did not make out his case without showing that there was no such piece of timber about. *Robinson* v. *Blake Manuf. Co.* 143 Mass. 528.

Judgment on the verdict.

P. ROBERT GREENE *vs.* JOHN S. DAMRELL.

Suffolk. November 17, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING JJ.

Mandamus — Permit to make Alterations in a Building in Boston.

Mandamus will not lie against the building commissioner of the city of Boston to correct an alleged error of the Court of Appeal, provided for by St. 1892, c. 419, in withholding a permit to make alterations in the petitioner's building.

PETITION, filed May 2, 1899, for a writ of mandamus to issue to the respondent, as building commissioner of the city of Boston, being the same officer as inspector of buildings, designated by St. 1892, c. 419, § 2, commanding him to grant a permit to the petitioner to make certain alterations in a building owned by him. Hearing before *Morton*, J., who dismissed the petition, and reported the case for the consideration of the full court. If the ruling was right, the order dismissing the petition was to be affirmed; otherwise the case was to stand for hearing on the question whether certain plans filed therein conformed to law, or such other disposition was to be made as law and justice might require. The facts appear in the opinion.

C. E. Washburn, for the petitioner.

S. M. Child, for the respondent.

BARKER, J. The respondent, as building commissioner, is in charge of the department of the city government of Boston known as the building department. St. 1895, c. 449, § 24. His official powers and duties are defined in a series of statutes which regulate the construction, alteration, and inspection of buildings in the city. See Sts. 1892, c. 419; 1893, cc. 170, 293, 464; 1894, cc. 257, 443; 1895, cc. 97, 239, 280, 314; 1896, cc. 416, 520; 1897, cc. 175, 300, 310, 418; 1898, cc. 209, 228,

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284, 308; 1899, cc. 161, 185. These statutes forbid the alteration of a building without a permit from the respondent. The petitioner has a building which he desires to alter. The respondent has refused a permit, and the court is asked to order him to issue one.

The statutes cited contain numerous and minute directions as to materials, plan, and construction, and also many provisions which leave the decision as to what shall be done to the judgment of the respondent. Anticipating that many instances would arise in which the commissioner would differ from parties interested as to the construction of the law, or as to what good judgment might require in matters left to the discretion of officials, the Legislature has provided, for the revision of the respondent's action in granting or refusing permits, a tribunal known as the board of appeal, consisting of three persons, each selected by a different body of citizens, with the approval of the mayor. St. 1892, c. 419, §§ 12–14. St. 1893, c. 464, § 1. St. 1894, c. 443, § 2. When refused a permit, the petitioner had a right to appeal to this tribunal, and he has exercised that right. Upon such an appeal there is a hearing, and after the hearing the board of appeal is required by the statutes cited to direct the commissioner either to issue the permit under such conditions as the board requires, or to withhold the permit. After an appeal resulting in a direction to withhold the permit the commissioner has no power to grant it. Such was the result in the case of the petitioner's appeal. If we should now order him to grant the permit, we should compel him to grant what the statute makes it his duty to withhold. The statute has no provision for revising the action of the board of appeal. As the matter stands, if the permit is now withheld because of error, that error is the error of the board of appeal. Whether, under general provisions of law for the correction of errors of inferior tribunals, this court can correct the errors of the board of appeal, or whether it was the intention of the Legislature that the decisions of the board should be final, we do not now consider. Its decisions cannot be revised upon this petition. The question of procedure is decisive of this case, and therefore we cannot consider whether the board of appeal transcended its powers in its order to the respondent.

Writ denied with costs of the petition.

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EDWARD H. PALMER, administrator, *vs.* NORTHERN MUTUAL RELIEF ASSOCIATION & trustee.

Suffolk. November 20, 21, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Mutual Benefit Association — Judgment founded on Death Benefit Certificate — Trustee Process.

The fund of a mutual benefit association set aside for the payment of death benefits, and paid in by members for that express purpose, cannot be trusteed in an action against the association to enforce a judgment founded on a death benefit certificate.

TRUSTEE PROCESS. The case was submitted to the Superior Court on an agreed statement of facts. The plaintiff moved that the trustee be charged upon his answer in the sum of $923.66. The motion was denied and the trustee was discharged; and the plaintiff appealed to this court. The facts appear in the opinion.

A. P. French, for the plaintiff.

E. Lowe, for the defendant.

LORING, J. This is an action on a judgment for $3,019.03, in which the plaintiff seeks to recover the balance due thereon with interest, after crediting a payment received from the defendant of $738.48. The action was begun by trustee process, and the Old Colony Trust Company, summoned as trustee, answered that it had in its hands two sums, one amounting to $78.46, and the other to $845.23; and it is agreed that "both said $78.46 and said $845.23 were, at the time of said trustee attachment, a part of the funds of the defendant association set aside for the payment of death benefits, and paid in by members for that express use."

The death benefit fund of a beneficiary association organized under Pub. Sts. c. 115, amended by Sts. 1877, c. 204, and 1880, c. 196, is in its essential characteristics a trust fund, and it is so designated by the Legislature. St. 1877, c. 204, is the first statute directly authorizing persons to associate themselves together to provide for the payment on their death of a pecu-

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niary benefit to those dependent upon them. The death benefit to be paid on the decease of each member was not to be raised by an assessment levied at his death, but was to be paid out of a fund to be created by levying an assessment on all living members, and to be "held by such association until the death of a member occurs," when the amount due those claiming under the deceased member was to be paid forthwith. St. 1880, c. 196, limiting the amount of the death fund to be held by beneficiary associations to one assessment of general membership or the aggregate of one assessment of each limited membership, and also to the sum of $10,000, and directing in what securities the fund should be invested, recognized that the death fund to be created under St. 1877, c. 204, § 1, was a fund not belonging to the beneficiary association, but held by it in trust for others; in this act the fund is spoken of "as a death fund belonging to the beneficiaries of anticipated deceased members," and it is provided "that such death fund while held in trust" shall be invested in the manner therein specified; and in every subsequent enactment the fund has been so designated. St. 1888, c. 429, § 9. St. 1890, c. 341, § 9. St. 1894, c. 367, § 8. St. 1898, c. 474, § 11. St. 1899, c. 442, § 12. This court, in ordering the distribution of the death fund of insolvent beneficiary associations, proceeded upon the theory that it was "a fund which the defendant corporation was to keep identified, and hold in trust for distribution among the policy holders when the time came. The fund is expressly called a trust by the statute, § 8"; Holmes, J., in *Fogg* v. *United Order of the Golden Lion*, 156 Mass. 431, 434; and in the case in which it was decided that a beneficiary can sue for the death benefit it was said: "This statute, like the St. of 1885, . . . treats the amount to be paid as the property of the beneficiaries, which they have a right to receive under the express provisions of the law, by virtue of their relation to the corporation, created by the certificate, in which the corporation recognizes them as beneficiaries entitled, on the happening of a contingency, to a fund which is collected and held in trust for them, in accordance with the requirements of the statute and of the by-laws of the corporation." Knowlton, J., in *Dean* v. *American Legion of Honor*, 156 Mass. 435, 438. See also *Buswell* v. *Order of the Iron Hall*, 161 Mass. 224, 231, 232.

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St. 1877, c. 204, § 1, also provided that "Such fund so held shall not be liable to attachment by trustee or other process." It appears from subsequent acts, codifying the law of beneficiary associations, that this provision means that the interest which a member, or those claiming under a member, have in the death fund shall not be attached in an action against them or either of them; St. 1888, c. 429, § 15; St. 1894, c. 367, § 14; St. 1898, c. 474, § 17; and it is argued by the plaintiff that, inasmuch as this provision of the statute does not exempt the fund from attachment in actions against the association, it can be so attached. But that argument loses sight of the fact that the death fund of a beneficiary association is a fund not belonging to the association as its own, but held by it in trust for those entitled under the certificates of membership in that association; and it does not require a statute to provide that a fund held by A in trust for B, in which A has no beneficial interest, cannot be attached for the debts of A, that is the rule of the common law. For a case where it was held that a similar trust fund could not be attached by persons having claims against a similar association, see *Burdon* v. *Massachusetts Safety Fund Association*, 147 Mass. 360; for instances of similar trust funds, see *Coe* v. *Washington Mills*, 149 Mass. 543; *American Loan & Trust Co.* v. *Northwestern Guaranty Loan Co.* 166 Mass. 337.

The plaintiff contends that however it may be in case of other claims, one whose claim is for a death benefit under a certificate of membership has a claim upon the death fund, and can attach it in a suit to collect the amount due him as a death benefit. It may be that such a person has a claim upon the death fund; but if he has, his remedy in case the defendant association refuses to pay a judgment which he has obtained on his certificate of membership is a bill in equity to enforce his rights as one of the beneficiaries for whose benefit the death fund is held, and not an action at law suing the association and trusteeing the death fund. Such a person could have his execution satisfied out of any general funds belonging to the association, if he could direct the sheriff where to put his hands upon them; or in a suit on the judgment he could trustee such funds; beneficiary associations have the right to acquire such general funds for expenses and similar purposes by levying the payment of a

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fixed sum at stated times; see *Burdon* v. *Massachusetts Safety Fund Association*, 147 Mass. 360, 363; or, when no such dues are payable, by levying assessments. St. 1894, c. 367, § 9. St. 1898, c. 474, § 12. St. 1899, c. 442, § 16.

The peculiarity of the case at bar lies in the fact that the parties have agreed that "the amount paid by the defendant association on account of the execution in the original suit, to wit, $738.48, was the amount received from the last assessment upon the members of the defendant association paid prior to the death of the plaintiff's intestate"; in view of that fact, the payment of the $738.48 was a full compliance with the contract between the association and the plaintiff's intestate, which provided that "if the amount received from the last assessment paid prior to said death is less than $2,000, the beneficiary of a member of the first rate shall not receive more than the amount of said assessment"; and the only possible explanation of the judgment which the plaintiff recovered against the defendant is that that fact was not proved at the trial, and consequently a verdict for the full $2,000 and interest was entered. Whether those interested as beneficiaries in the death fund are estopped by the judgment to deny the fact here agreed upon as a judgment recovered against the association as representing them is not now before the court.

It also appears from the facts in the case at bar that the $78.46 and $845.23 which were held by the Old Colony Trust Company at the time it was served as trustee are funds which "were assessed and collected from the members of the defendant association subsequent to said payment by it of $738.48 on account of the execution in the original suit"; and that checks for the two sums making up the fund in the hands of the Old Colony Trust Company had been drawn before the trustee process was served to pay that fund to the persons who, independently of the judgment rendered in this case, would be entitled thereto.

It is apparent, therefore, that the question whether the plaintiff is entitled to any part of the fund in the hands of the Old Colony Trust Company depends upon questions which can properly be raised only in a bill in equity brought to ascertain the beneficial ownership in said funds in which the other parties who claim to be entitled to it are parties. The entry must be,

Judgment discharging trustee affirmed.

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INHABITANTS OF WINTHROP *vs.* ELIZA M. SOULE, executrix, & another.

SAME *vs.* ELIJAH CROSBY.

Suffolk. November 21, 22, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Bond — Town — Auditor's Report — Negligence — Evidence.

No exception lies to the admission in evidence of an auditor's report, objected to for the first time upon the ground that his conclusions were based on incompetent evidence.

Negligence of the officers of a town, in not discovering at an earlier date the defalcation of its collector of taxes, will not discharge the sureties on his bond.

Evidence that the officers of a town sent to the sureties on the bond of its collector of taxes copies of a book published by the town for certain years, containing printed copies of the reports of the auditor and of the treasurer of the town for those years, which reports contained alleged false statements as to the accounts of the collector of taxes, inducing the sureties to lie quiet and to take no steps to protect themselves from loss until the collector, who was a defaulter, had transferred his property and the lien for uncollected taxes was lost, is inadmissible in an action by the town on the bond.

TWO ACTIONS OF CONTRACT, upon a bond executed by E. Everett Crosby as principal and by Elijah Crosby and Horatio S. Soule as sureties, and conditioned for the faithful performance by the principal of the duties of collector of taxes of the plaintiff town. Writs dated November 4 and 9, 1896, respectively. The cases were tried together in the Superior Court, before *Sheldon*, J., who allowed a bill of exceptions in each case, in substance as follows.

The defendant E. Everett Crosby was duly elected collector of taxes of the plaintiff town on March 5, 1894, and on August 15, 1894, gave the bond in suit.

On August 20, 1894, the assessors of the town duly committed to Crosby a warrant and tax list for a total assessment of $75,039.07. Crosby entered upon the performance of his duties as collector, and continued as such collector until about the middle of October, 1896, when he disappeared. At the time of his disappearance he had collected of the taxes so committed to him $72,660.34, and had paid over to the town treasurer

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$66,398.06, leaving a balance of $6,262.28 collected by him and not accounted for. Crosby failed to collect of the taxes on the tax list which had been committed to him, taxes amounting to $2,507.94. By vote of the town passed March 5, 1894, it was voted that six per cent interest be charged upon all taxes remaining unpaid November 1, 1894, and interest was due upon the uncollected taxes of $302.20 at the date of each writ. Of this amount of uncollected taxes and interest the sum of $1,464.34 was collected by David Floyd after Crosby's disappearance, Floyd having been elected collector by the town, and charged with the collection of the balance of the taxes of 1894 not collected by Crosby. The only evidence introduced by the plaintiff was the report of an auditor in its favor, which was filed October 8, 1898. The defendants on February 27, 1899, before trial, duly moved to recommit the auditor's report for amendment, but this motion was denied. The defendants objected to the admission of this report in evidence, on the ground that it appeared that certain evidence was admitted and considered by the auditor which they contended was inadmissible, but failed to set out this evidence, so that the defendants were unable to have the matter duly passed upon by the court. The judge overruled the objection, and admitted the report; and the defendants excepted.

The defendants offered to prove that the following by-laws of the plaintiff town were in force during the period from March, 1894, to the date of each writ:

"On the first secular day of each month, and as often as the amount in his hands reaches two hundred dollars or upwards, the collector shall pay over to the treasurer of the town all taxes by him collected, and shall, on or before the seventh day of February in each year, make up his annual account and render the same to the selectmen.

"At each annual meeting the town shall choose two auditors, whose duty it shall be to examine the books and accounts of the selectmen, treasurer, collector, and all other special committees or officers having the charge of the expenditure of money, as soon as possible after the close of the financial year of the town, and report at the next town meeting in detail, under their respective heads, all the receipts and expenditures by

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the town for the previous year. Said report, with the annual reports of the selectmen, assessors, overseers of the poor, surveyors of highways, school committee, town treasurer, town clerk, collector of taxes, sinking fund commissioners, board of health, and superintendent of the cemetery, shall be printed by the selectmen, and a copy thereof left at every dwelling-house in town, four days at least, before the annual meeting, and twenty-five copies shall be delivered to the town clerk."

The defendants further offered to prove that the collector did not turn over the amounts collected by him in the manner required by the by-laws, nor did the treasurer require it or make demand therefor; that the town elected auditors for the year 1894, who, in the spring of 1895, took from Crosby a statement of collections and receipts that he had made upon the taxes of 1894; that the auditors made no examination whatsoever of the books of the collector, although if such an examination had been made it would have shown that the statement then made by Crosby was untrue, and that a larger amount of the taxes had been collected by him and had not been turned over to the town treasurer; that a book called "The Forty-third Annual Report of the Officers of the Town of Winthrop, Massachusetts, for the year ending January 1, 1895," published in accordance with the by-laws, and also in accordance therewith delivered at every inhabited house in the town, contained a report of the auditors dated February 14, 1895, the material part of which was as follows:

"We hereby certify that we have carefully examined and compared the books and accounts of the selectmen, overseers of the poor, treasurer, collector of taxes, town clerk, and trustees of the public library of the town of Winthrop, and all original bills and vouchers on which moneys have been paid from the treasury of said town during the past year, and find the same to be correct."

This book also contained the report of the collector, dated January 9, 1895, which was identical with the statement submitted by him as above stated to the auditors, in which he charged himself with the following items: "Amount of assessors' warrant, $75,010.67; added assessments, $53.64; interest, $19.77"; and credited himself with the following items:

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"Cash paid treasurer, $49,531; abatements, $610.10; balance of unpaid taxes, $24,972.98."

The defendants further offered to prove that a copy of this book was sent to the defendant, Elijah Crosby, at his request, at his home in Chatham, and was examined by him, and he relied upon the statements therein; that another copy of this book was sent to Soule, the other surety, in Florida, where he then was, and was examined by him; that Soule died in the spring of 1895, and the defendant Eliza M. Soule was appointed executrix of his will; that in the year 1895 the plaintiff town elected auditors, who, in the spring of 1896, took from E. Everett Crosby a statement similar to that taken by the auditors of the previous year, but made no examination of his books, although if such an examination had been made it would have appeared that the statement was entirely untrue, and that more money had been collected than was set out in the statement; that a book called "The Forty-fourth Annual Report of the Officers of the Town of Winthrop, Massachusetts, for the year ending January 1, 1896," published and delivered in the same manner as the "Forty-third Annual Report," contained the report of the collector, dated January 8, 1896, which was identical with the statement made by him to the auditors as above stated, in which he charged himself with the following items: "Balance of unpaid taxes, $24,972.98; interest, $493.60"; and credited himself with the following items: "Cash paid treasurer, $13,365.60; abatements, $231.57; balance of unpaid taxes, $11,878.41"; and also contained a certificate of the auditors, the material part of which was as follows: "We hereby certify that we have examined the accounts of the selectmen, treasurer, collector of taxes, trustees of public library, and sinking fund commissioners, and find same to be correct."

The defendants further offered to prove that E. Everett Crosby was possessed of certain property, real and personal, prior to the issuing of the reports above mentioned; that before he absconded he encumbered such property by the execution of mortgages, and made conveyances of the property to persons other than the sureties; that the sureties and the defendant executrix relied upon the statements published by the town in the reports, and so relying took no steps to provide for the

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proper performance of his duties as collector by Crosby and to protect themselves against the consequence of his default; that he did not disappear until the lien for taxes for the year 1894 upon the estate of the persons taxed had expired; that until his disappearance the defendants and the testator had no notice or knowledge of any defalcation or improper action by him; that the defendants and the testator were induced by the false statements published by the town to remain quiet until the time of Crosby's disappearance, and were thus deprived of the benefit of enforcing the collection of unpaid taxes while a lien for the enforcement thereof existed, and of the benefit of the property of Crosby to make good any loss caused to them by his defalcation; and that citizens of the plaintiff town assessed for taxes for the year 1894, alienated their property after the first day of October, 1894, and before action could be taken by Floyd to collect the same, so that any lien upon such property was lost.

The judge ruled that these facts, if established by evidence, would not constitute a defence in law; and directed the jury to return a verdict for the plaintiff, in each case. The defendants alleged exceptions.

W. C. Wait, for Eliza M. Soule.

F. J. Dakin, for Elijah Crosby.

E. R. Thayer, for the plaintiff.

BARKER, J. 1. The exception to the admission in evidence of the auditor's report is not argued. The objection to the report that his conclusions were based on incompetent evidence, could not be taken for the first time at the trial. *Briggs* v. *Gilman*, 127 Mass. 530. *Collins* v. *Wickwire*, 162 Mass. 143. See *Sullivan* v. *Arcand*, 165 Mass. 364, 367. The report was properly admitted.

2. The remaining exception is to the rejection of a somewhat extended offer of proof on the part of the defendants. Speaking generally, this offer may be divided into two branches. One is that different officers of the town were grossly negligent in not discovering at an earlier date the defalcation of its collector of taxes. Each of the excepting parties now concedes that such negligence will not discharge the sureties upon the collector's bond. See *Amherst Bank* v. *Root*, 2 Met. 522; *Watertown Ins. Co.* v. *Simmons*, 131 Mass. 85. The other branch of the offer

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was to show that the officers of the town, in accordance with its by-laws, sent to the sureties on the bond copies of the town's book for the years 1895 and 1896, containing printed copies of the reports of the town auditors and of the town treasurer for those years, which reports contained false statements as to the accounts of the collector of taxes, which false statements induced the sureties and the executrix of Horatio S. Soule to remain quiet and to take no steps to protect themselves from loss until the defaulting collector had transferred his property, and the lien for uncollected taxes was lost.

We are of opinion that this evidence also was rightly excluded. In the first place the by-law did not authorize any other distribution of the town book than the leaving of a copy thereof at every dwelling-house in the town four days at least before the annual town meeting and the delivery of twenty-five copies to the town clerk. Therefore the sending of copies to one surety in another town where he resided, and to another surety in the State of Florida where he then was, was not done in accordance with the by-law, and was not the act of the town, but the unauthorized act of the selectmen, or of the person who so sent those copies.

Aside from this, if we should assume that the copies were sent by authority of the town, the fair construction of the statements of the town book is not that contended for by the defendants. The plain purpose of the publication was merely to give to those interested early information as to the tenor of the reports copies of which were contained in the book. By publishing copies of the reports the town could not be understood to assert that the statements of the reports were true, and to invite those who should receive the copies to rely upon the truth of those statements. The publication was rather an invitation to all persons interested to examine the truth of those statements, which in the nature of things must be dealt with by the town at its approaching annual meeting, to criticise and investigate, and to take such steps as they might desire to protect their own rights. As addressed to the sureties upon the collector's bond, the true construction to be placed upon the sending to them of copies of the reports of the town officers was as if the town had said, "You are responsible for the due discharge of the

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collector's duty. He claims, by his report, to have made no default. The town auditors report that his accounts are correct. We invite you to look into the matter so far as you may be interested in it and to take such action as you may see fit." Neither the sending of the copies, nor the subsequent acceptance of the reports by the town meeting, can be construed to be a representation by the town to the sureties that the statements of the reports were true, or an inducement to them to sleep upon their rights. The only representation made by the publication of the town book was that the several reports, copies of which it contained, were of the tenor therein set forth. This representation was not false, but true. If it is to be treated as a statement of the town to the sureties, that is the only sense in which the sureties had a right to understand it, and it was neither intended nor calculated to deceive them, and does not bring the case within the principle of *Baker* v. *Briggs*, 8 Pick. 122, or of *Carpenter* v. *King*, 9 Met. 511. See *Fitchburg Savings Bank* v. *Rice*, 124 Mass. 72, 76.

The evidence offered did not tend to show that the town had released any security which it held or negligently suffered any lien to expire. The whole contention at the trial was that the sureties by relying upon the truth of the reports of the town auditors and the town treasurer had lost the opportunity to protect themselves by discovering the defalcation and using means to secure themselves out of the defaulter's property, and by collecting the taxes committed to him for collection.

Exceptions overruled.

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MARY F. REED, guardian, *vs.* HARLAND G. BACON & another.

Norfolk. November 23, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Promissory Note — Partnership — Action — Variance — Agency — Indorsement — Insolvency — Evidence.

An action may be maintained against the members of a partnership on a promissory note signed by one member and indorsed by him in the firm name, given in renewal of a note delivered to carry out a contract whereby the plaintiff made an agreement with the maker of the note who undertook to act for the firm to lend to the firm, and the firm agreed to borrow of him, a certain sum; and the fact that the maker of the note put the money into his own account instead of into that of the firm will not affect the plaintiff's rights, if he was ignorant of it.

Proof of the original promissory note, made as a step in showing the character of a renewal note, will not support a claim of variance under a declaration counting on the renewal note.

If, in an action on a promissory note given for money lent by the payee to the maker, the evidence shows that A. acted as the go-between in making the contract, it is competent for him to testify to the agreement made through him, and it is immaterial whether he was anybody's agent, and, if so, whose.

If a promissory note bears an indorsement when delivered to the payee, an indorsement made by him when he puts the note in the bank for collection does not make him the first indorser.

In an action on a promissory note signed by A., one member of a firm, and indorsed by the firm, and which was given for a loan of money negotiated by B., if there is evidence that statements were made by the firm to B. to be transmitted and which were transmitted by him to the lender, which statements prove the plaintiff's case, the defendants are not entitled to a ruling that "no statements were ever made by A. to the plaintiff touching the note in suit, according to the plaintiff's case, and the partnership cannot therefore be bound."

The holder of a promissory note bearing the valid indorsement of a partnership made by one partner may prove it against both the latter's estate and that of the firm in insolvency.

Evidence of the person who negotiated a loan of money for which a promissory note was given, as to the statements made to him by the borrower, and of the lender as to the former's statements to him in relation to the matter, is admissible in an action on the note.

CONTRACT, against Harland G. Bacon and Daniel O. Scofield, "late copartners under the firm name of Lincoln, Bacon, & Co.," upon a promissory note for $4,860.90, dated March 11, 1896, payable twelve days after date to the order of the plaintiff, signed "H. G. Bacon," and indorsed "Lincoln, Bacon, & Co."

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Writ dated October 10, 1898. Trial in the Superior Court, without a jury, before *Braley*, J., who allowed a bill of exceptions, in substance as follows.

It was agreed that the defendants were copartners under the firm name of Lincoln, Bacon, and Company. The genuineness of the signature to the note and of the indorsement was admitted. It was also agreed that the defendant Bacon, who testified that he made and indorsed the note, had since the execution of the note made a personal assignment for the benefit of creditors; and that a payment of eight per cent of the face value of the note had been made thereon.

Herbert E. Thompson, called as a witness by the plaintiff, testified that he looked to a certain extent after the investment of the plaintiff's money, or advised with her regarding the investment of her money; and that he had some talk with the defendant Bacon "about borrowing money for him for the firm."

He was then asked the following question, which was admitted, subject to the defendant's exception: "What conversation, if any, did you have with Bacon concerning a loan of $5,000?" To which the witness answered as follows: "The plaintiff had $5,000 paid her through me from the Clemens Company and put it in the bank. A few days afterwards, or some time afterwards, Bacon asked me if there had been anything done with that money. I told him I did n't know certain, but would find out; that the plaintiff had not spoken to me about it. He said, 'If there has n't we would like to have it, we can use it.' I saw the plaintiff and she gave me this check and I gave it to Bacon, and he gave me the note and I gave it to her. I had further conversation with Bacon at that time concerning this money other than I have testified to. It was just before the first of the year some time. It was in 1892 or 1893, I should say. Bacon said at that time of the year money came in slowly, and after January the money usually came in and they would have the money."

The witness was then asked the following question: "What was the conversation you then had with the plaintiff about this money?" To which he answered as follows: "I told her that Bacon said that they could use the money down there. Besides, it was said at that conversation by myself to

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her, that they could use it and I thought it would be better for her to let them have it than to let them have it in the bank, as it was a national bank. The only further conversation at that time that I remember was, that Bacon had signed the note and the company would indorse it, and they would pay us six per cent."

On cross-examination, the witness testified, among other things, as follows: "The way it came that this note was made to the order of Mary F. Reed, guardian, was, the note has been renewed, as I understand, several times. . . . He did not tell me in so many words that the $5,000 was for Lincoln, Bacon, & Co., but I understood it was from statements he made to me."

The admission of this last statement was excepted to.

The plaintiff testified as follows: "The circumstances concerning the loaning of that money as I remember them are: It was a $5,000 note that the electric company borrowed of me, then Mr. Thompson came to me and told me that they wanted it down at the factory, and that Mr. Bacon thought they could use it, and that they would give me the company's indorsement, Lincoln, Bacon, & Co.'s indorsement, and I supposed that when I got that I was having the company's indorsement. Mr. Thompson came to me about that about a week after he gave me the check from the electrical company. I further remember concerning it, that Mr. Thompson said that they would give me the company's indorsement and a good six per cent interest, and it would be good security. I could n't tell just when this was, but to the best of my recollection I think it was in 1892 or 1893, somewhere there."

On cross-examination, she testified as follows: "I have made other loans to Mr. Bacon; I have loaned some money to Lincoln, Bacon, & Co. I loaned money to him personally. I could n't tell whether it was the time this $5,000 was loaned. My notes were renewed so often and it is so long ago I could n't remember that. I don't recollect my transactions with Mr. Bacon, — Lincoln, Bacon, & Co., concerning any other than this note of $5,000; that is all. That which impresses the facts concerning this note so well upon my memory is on account of this being the electrical company note. It is n't possible that this electrical money went in some of the other loans. The

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money that I got from the electrical company came to me by check, which I put in the bank. That money could n't have been some of the other money that I loaned Mr. Bacon. I did not see Mr. Bacon about this loan; it was contracted between Mr. Thompson and him, and I never saw Mr. Bacon about it. I am certain of that. I never had any conversation with Mr. Bacon about any money excepting when I wanted it. And when I wanted it, was a month or two before the assignment was made, and then I called on Mr. Bacon, and told him that I wanted it and ought to have it, and he told me that he would pay it; he paid me one note, his note of $4,000. He paid that to me in February before the failure. That was in February, 1896, three years ago. Then the $4,850 had the indorsement of Lincoln, Bacon, & Co. on it, and that was, — I can't tell just when that was to have been paid, but I know he came to me and wanted the note renewed for two weeks, and he did n't pay it then. Then he came and wanted it renewed for ten days and I had it renewed."

The defendant Bacon testified as follows: "When I delivered that note, the first note, I think it did not contain the firm's indorsement. No, sir, it did not. I got the money on this note. As to putting the money into the firm I don't remember the exact circumstances, I don't feel that I did put it in the concern. I think they had it all at different times, that is what I think. But it went through my bank account, I think, and I let them have some at intervals, as I was in the habit of doing with other sums. That was regardless of this note. I presume that the money which I got on this note went into my bank account."

On cross-examination, the witness testified as follows: "I had borrowed some money of her sometime before this. I borrowed some for the firm and some on my own account, and for others; my name was on everything either as signer or indorser. I have borrowed money for the firm of Lincoln, Bacon, & Co. of her. Where it went directly to the company I made the note of the firm and indorsed it personally; that is, where I put the money directly in the firm. I borrowed considerable money of people afterwards. I looked after the whole financial part of the business there, and all the rest of it,

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manufacturing and everything. The business was the manufacturing of jewelry. I generally signed or indorsed the notes for the capital that was borrowed. So far as I know, all the money that was borrowed there for the use of the firm in any way was borrowed by me; either in my own name, or on behalf of the firm in some way."

On re-direct examination, the witness testified that he thought that the proceeds of this note went into his individual bank account.

The defendant Scofield testified as follows: "Mr. Bacon borrowed money from time to time. He told me of his borrowings when he borrowed for the firm. The first I heard of the note in suit was about the time of the failure, about three years ago, — that was the first I ever knew of it. . . . Mr. Bacon had no authority from me to indorse the note in question."

Henry A. Hall, called as a witness by the defendants, testified that he was employed as a bookkeeper by them; that the original note had been renewed at the end of six months; and that the last renewal was dated March 14, 1896.

Thompson, recalled, testified that when he took the original note from Bacon and delivered it to the plaintiff, the indorsement of Lincoln, Bacon, and Company was on the back of the note; and the plaintiff, recalled, testified that when she received from Thompson the original note the indorsement of Lincoln, Bacon, and Company was on the back of that note.

At the conclusion of the evidence, the defendants made the following motions:

"1. To strike out the evidence of the plaintiff's witnesses on the ground that there is variance between the declaration and the proof. The declaration states that the note was made by Bacon and indorsed by the firm. The evidence was intended to show that the debt was contracted by the firm and not by Bacon individually. 2. To strike out the evidence of Thompson as to statements made to him by Bacon and by Thompson to the plaintiff, on the ground that there is no evidence that Bacon directed him to do so. 3. To strike out the evidence of Thompson, on the ground that there is no evidence to support a claim of agency outside of Thompson's own statements. 4. To strike out from the evidence of the plaintiff all statements made

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to her by Thompson, because there was no ground laid for such evidence, except through the evidence of Thompson, which is inadmissible."

The judge declined to allow any of the above motions; and the defendants excepted.

The defendants further made the following requests for rulings:

"1. The plaintiff has not proved the allegation set forth in her declaration. 2. The note sued upon is not proved by any evidence. All the evidence touches a $5,000 note made in 1891 or 1892, and the note in suit was given March 11, 1896, and is for $4,890.60. 3. The plaintiff's case rests upon an alleged agency by Lincoln, Bacon, and Company to Thompson. There is no evidence sufficient in law to establish this agency. 4. There being no sufficient evidence to contradict the evidence of the note itself, the plaintiff, the payee, is the first indorser, and Lincoln, Bacon, and Company the second indorser. A prior indorser cannot sue a subsequent indorser without evidence outside of the instrument. 5. No statements were ever made by Bacon to the plaintiff touching the note in suit, according to the plaintiff's case, and the partnership cannot therefore be bound. 6. The plaintiff has, subsequent to the making of the note in suit, treated it as the individual debt of Bacon by proving the note itself as a claim against the personal (assigned) estate of Bacon and receiving an eight per cent dividend thereon, and this she has done with the knowledge that the assigned estate of an individual partner cannot, nor can any part thereof, go to pay a debt of his firm till his individual debts are paid in full. 7. The plaintiff's case rests only upon the note itself and what it by its terms purports to be. 8. The defendant Bacon is the maker of the note, and presumptively it is his note, and the money loaned thereon was for his benefit. 9. This note shows upon its face that it was made by an individual and indorsed by him in the name of his firm. These facts were sufficient to put the plaintiff on inquiry as to whose benefit the note was issued. 10. A person loaning on commercial paper has no right to shut his eyes to warnings appearing on the face of the paper touching the liability of those to be holden thereon. 11. The indorsement is really a

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guarantee and a contract of guarantee *strictissimi juris*. 12. The plaintiff well knew that Lincoln, Bacon, and Company were manufacturers of jewelry, and that it was not the business of the firm to act as accommodation indorsers. She cannot presume that the indorsement of the firm name on the note in question of itself bound the partnership. 13. The burden is upon the plaintiff to show affirmatively and satisfactorily in some manner that the indorsement in question was authorized by the firm, and this has not been proved. 14. Upon all the evidence the plaintiff has failed to sustain the burden of proof and make out a case, and judgment should be for the defendant."

The judge gave the rulings asked for numbered eight, nine, ten, eleven, and twelve, and the thirteenth, as to the burden of proof, but no more, and refused to give the other rulings requested; and the defendants excepted.

The judge found for the plaintiff; and the defendants alleged exceptions.

C. A. Decker, (of New York,) (*F. H. Williams* with him,) for the defendants.

H. J. Fuller, (*W. H. Pond* with him,) for the plaintiff.

LORING, J. The defendants' exceptions must be overruled.

1. There was evidence warranting a finding for the plaintiff; there was evidence that the note sued on was given in renewal of a note delivered to carry out a contract whereby the plaintiff agreed to lend to the firm of Lincoln, Bacon, and Company, and that firm agreed to borrow of the plaintiff, $5,000. A note signed by Bacon, one member of the firm, indorsed by the firm to carry out that contract, is given in the course of the firm's business, and binds all partners. *Wait* v. *Thayer*, 118 Mass. 473, 478. *Cooper* v. *McClurkan*, 22 Penn. St. 80, 84. *Langan* v. *Hewett*, 13 Sm. & M. 122. *Steuben County Bank* v. *Alberger*, 101 N. Y. 202. Dan. Neg. Instr. § 365.

The fact that the note was indorsed by the firm and was delivered in carrying out an agreement by which the firm agreed to borrow the money therein agreed to be paid, distinguishes this case from *Atlas National Bank* v. *Savery*, 127 Mass. 75; and *Smith* v. *Weston*, 159 N. Y. 194, in which it is held that a firm is not, at least *prima facie*, liable on such note when given for a loan made to one partner.

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The bill of exceptions does not show to whom the cheque was payable by which the $5,000 borrowed by the firm was paid; if the cheque was made payable to Bacon personally, that would have been evidence tending to control the evidence that it was paid under a contract whereby the firm agreed to borrow the money. There was evidence that the defendant firm had been in the habit of borrowing money to carry on the firm business, and that that part of the firm business had been conducted by Bacon, the partner who made this agreement, signed this note as maker, and indorsed the firm name on the back. It appears that the $5,000 never reached the firm, but was intercepted on its way and put into Bacon's private account; but it is not shown that the plaintiff knew this; if she was ignorant of it, it could not affect her rights; her rights could not be affected by Bacon's act in wrongfully putting into his own bank account the firm's money which he had borrowed in its behalf. The fourteenth ruling requested was properly refused.

2. There is nothing in the first and second rulings requested. The plaintiff declared on the renewal note and proved it; and how proof of the original note made as a step in proving the character of the renewal note could be thought to lay the foundation of a claim of variance under a declaration counting on the renewal note is not apparent to us.

3. The third request was properly denied. There was evidence that Thompson acted as the go-between in making the contract; it is not material whether he was anybody's agent, and, if so, whose.

4. The fourth request was properly denied. There was evidence that the name of Lincoln, Bacon, and Company was on the note when it was delivered to the plaintiff, and an indorsement made by the plaintiff as payee when she put the note in the bank for collection did not make her the first indorser.

5. The fifth request was properly denied. There was evidence that statements were made by Lincoln, Bacon, and Company to Thompson, to be transmitted, and which were transmitted, by him to the plaintiff, which statements proved the plaintiff's case.

6. The sixth request was properly refused. The holder of a

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note bearing the valid indorsement of a partnership, made by one partner, may prove it against both estates in insolvency.

7. The eighth, ninth, tenth, eleventh, twelfth, and thirteenth requests were given, so far as the burden of proof goes; so far as they asked for a ruling that the position of the names of the firm and of the individual partner on the note sued on was finally decisive against the plaintiff's right to recover from the firm they were wrong, for the reasons given in disposing of the fourteenth ruling requested.

8. That the testimony of Thompson and of the plaintiff were admissible is too plain to require discussion; the other points covered by the motions made at the conclusion of the evidence have already been disposed of. *Exceptions overruled.*

CHARLES E. JONES *vs.* EDWARD G. SHATTUCK.

Suffolk. November 23, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Collision between Bicycle and Carriage — Evidence — Due Care — Negligence — Instructions.

A person who, after an accident caused by a collision between a bicycle and a horse and carriage, injuring the rider of the bicycle, followed the occupant of the carriage as he drove rapidly away, may testify, in an action against the latter for the injury, that when he overtook the defendant he told him that he was sent to see who he was, and the defendant refused to give his name; and the witness may testify also that the defendant drove away and did not turn back until requested so to do by him, although this is denied by the defendant.

In an action for personal injuries caused by a collision between a bicycle ridden by the plaintiff and a horse and carriage driven by the defendant, the plaintiff having passed A.'s team going in the same direction before the collision, and the evidence upon the question whether the plaintiff or the defendant was complying with the rule of the road, and as to the speed at which the defendant was driving, being conflicting, the defendant is not entitled to have the jury instructed that "if the plaintiff came round from behind A.'s team and the defendant had not the opportunity to perceive the plaintiff until it was too late to stop or change the direction of the defendant's horse, the defendant would not be liable."

At the trial of an action for personal injuries caused by a collision between a bicycle ridden by the plaintiff and a horse and carriage driven by the defendant, the request for a ruling that "if the plaintiff was travelling on his wheel at a

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rate faster than seven miles an hour just before and up to the instant of the accident, and that was one of the causes of the accident, he was not in the exercise of due care," is in conflict with St. 1894, c. 479, and is rightly refused.

TORT, for personal injuries caused by a collision between a bicycle ridden by the plaintiff and a horse and carriage driven by the defendant on Commonwealth Avenue in Boston, through the alleged negligence of the defendant. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. M. Hall, for the defendant.

J. F. Cronan, for the plaintiff.

LORING, J. The plaintiff's evidence tended to prove that at about six o'clock of the afternoon in question he was riding on his bicycle from Boston to Brookline; that he rode down Commonwealth Avenue, in Boston, on the right-hand side of the left hand of the two driveways which run one on each side of the park making the centre of that avenue, until he came to the point where the two driveways meet and the park or centre ends; that he then continued in the same direction, across the open square made by the intersection of Beacon Street, Commonwealth Avenue, and Brookline Avenue; that he was riding at the rate of five or six miles an hour; that as he reached a point about sixty feet away from a watering-trough in front of the apex of the triangle formed by Beacon Street and Brookline Avenue, he passed a team going out over Beacon Street toward the watering-trough, and getting by the team he saw the defendant's wagon one hundred and seventy-five to two hundred and twenty-five feet away from him, with nothing to obstruct the view between the two; that the defendant was driving towards him and did not turn out to avoid him; that when he was ten or eleven feet away from the defendant's team, he turned his wheel sharply to the right to avoid a collision and came in contact with the left-hand shaft of the team; and that the defendant was on the wrong side of the road and was driving at the rate of ten or twelve miles an hour.

The defendant's evidence tended to show that he was driving from the direction of Brighton on the northerly driveway of Commonwealth Avenue, at the rate of about four miles an hour;

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that the plaintiff suddenly swung round in front of a team crossing Commonwealth Avenue on Beacon Street, going toward the watering-trough, and struck the fore shoulder and fore leg of his horse; that the plaintiff came so suddenly from behind and around this team that he could not stop his horse in time to prevent a collision; that he was on the proper side of the road and that the plaintiff was on the wrong side of the road; that his horse was frightened and ran; that he got him under control and returned voluntarily to the point where the accident occurred; and that when he arrived there, the plaintiff had been taken away in a coupé.

One of the plaintiff's witnesses testified that "after the plaintiff was struck, the defendant drove rapidly away." Afterwards, one Mauer, another of the plaintiff's witnesses, testified: "I was on my bicycle going towards Brighton, on the right-hand side of the road; I heard the sound of a carriage coming along fast; the carriage was coming along very fast; I saw the boy lying in the street; I turned around and followed the carriage. . . . I told the defendant they wanted him back there; he said, 'What for?' I said some one was run over, and the defendant turned and went back; later he went away again and I followed him to the stable in Pembroke Street and saw him get out of the carriage. . . . I told him we were sent to see who he was. He called me in. I gave him my name and address and asked him his, and he said, 'Never mind my name.'" On cross-examination, the same witness stated: "When the defendant in the carriage drove back to the scene of the accident, the coupé into which the plaintiff had been put had just started off, and the plaintiff was gone; that the defendant then turned and drove towards the stable and I followed him." Another witness subsequently testified: "I saw the vehicle going away at a rapid rate; I did not see the occupant of the carriage, saw no whip used and heard nothing said to the horse."

1. The defendant's first exception is to the admission of Mauer's testimony. The refusal of the defendant to give his name to Mauer, who said, "We were sent to see who he was," might reasonably be considered by the jury to be an act indicating that the defendant did not wish his name known and was endeavoring to hide it from the plaintiff. The defendant's coun-

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sel argues that the defendant was under no obligation to give Mauer an answer, because Mauer's action in following the defendant and demanding his name was entirely gratuitous, and, in fact, he had not been sent. But this was not known to the defendant at that time, and it is his refusal to give his name under the circumstances then appearing which is significant; we think the testimony was competent. We also think it was competent for Mauer to testify that the defendant drove away and did not turn back until requested so to do by him, though this was denied by the defendant. It was for the jury to determine whether they believed Mauer or the defendant on that point.

2. The defendant requested the court to instruct the jury: "First. If the plaintiff came round from behind McGovern's team, and the defendant had not the opportunity to perceive the plaintiff until it was too late to stop or change the direction of the defendant's horse, the defendant would not be liable." The defendant contended that the rule of the road applied to the locus where the accident happened. This instruction was deficient if, as the defendant contended, the rule of the road applied to the case; it was deficient because it omitted from the case the question whether the defendant or the plaintiff was complying with the rule of the road; on this point the evidence was conflicting; it was also deficient in not instructing the jury what consideration should be given by them to the speed at which the defendant was driving, on which point, also, the evidence was conflicting; if the jury believed that the defendant was driving at the rate of ten or twelve miles an hour, the facts stated in this ruling would not have been, as matter of law, a defence; *Purtell* v. *Jordan*, 156 Mass. 573; that fact would have taken the case out of the rule laid down in *Messenger* v. *Dennie*, 137 Mass. 197, and the other cases relied on by the defendant in this connection. The principle of this request, so far as it was applicable to the case, was adopted by the presiding justice, and instructions fully covering the facts of the case were given. The judge was not bound to tell the jury that certain facts would or would not constitute negligence apart from other facts already testified to. *Ellis* v. *Lynn & Boston Railroad*, 160 Mass. 341.

3. The ruling requested by the defendant, "Third. If the plaintiff was travelling on his wheel at a rate faster than seven

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miles an hour just before and up to the instant of the accident, and that was one of the causes of the accident, he was not in the exercise of due care," is in conflict with the St. 1894, c. 479, and was rightly refused.

4. There was evidence of negligence on the part of the defendant and of due care on the part of the plaintiff, and therefore the fourth, fifth, and sixth requests for rulings were rightly refused.* *Exceptions overruled.*

DE LA VERGNE REFRIGERATING MACHINE COMPANY *vs.* HUB BREWING COMPANY & others.

Suffolk. December 6, 1899. — March 2, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Construction of Contract — Patent — Equity.

A. submitted to B. a written "proposal and specification," by which A. proposed to furnish B. a refrigerating plant, describing it, and to authorize and permit him to operate it when placed within his premises, and to use A.'s patented system as applied to the plant "free from any royalty over and above the purchase money hereinafter specified to be paid to us during and after the completion of said apparatus." This was followed by a written contract executed by A. and B., by which A. agreed to construct for and deliver to B. on the premises of C. the apparatus made under letters patent owned or controlled by A. for a certain sum to be paid by B. to A. in three instalments, one when the material was delivered on the premises, the second "thirty days after the date on which the plant is ready to do work," and the third sixty days thereafter. *Held*, that A. could not maintain a bill in equity to prevent the use of the plant delivered under the contract, until the payments provided for therein had been made.

BILL IN EQUITY, filed December 5, 1898, against the Hub Brewing Company, the United States Trust Company, and Adolph Segal, to prevent the use of a refrigerating plant constructed by the plaintiff for Segal and delivered upon the premises of the Hub Brewing Company under a contract with Segal, until the payments provided for by the contract had been

* These requests were as follows: "4. There is no evidence of the negligence of the defendant. 5. The plaintiff was not in the exercise of due care and cannot recover. 6. The plaintiff is not entitled to recover."

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made. The bill was taken for confessed against Segal. Hearing, as between the plaintiff and the Hub Brewing Company, before *Holmes*, C. J., who reserved and reported the case for the consideration of the full court. The facts material to the point decided appear in the opinion.

H. W. Chaplin, (*R. Homans* with him,) for the plaintiff.

R. W. Nason, for the Hub Brewing Company.

BARKER, J. The short ground for dismissing the bill is that by the true construction of the contract between the plaintiff and Segal the former sold to Segal the refrigerating plant, with the right to use it under the patents, for the price of $16,000, to be paid in three instalments; and that neither the title to the plant nor the right to use the patents was made conditional upon the payment of the purchase money.

The contract is contained in two instruments, one entitled "proposal and specification," and the other, to which the first is annexed, entitled "contract." By the first the plaintiff proposes to furnish Segal a refrigerating plant, describing it, and to authorize and permit him to operate it when placed within his premises, and to use the plaintiff's patented system as applied to the plant "free from any royalty over and above the purchase money hereinafter specified to be paid to us during and after the completion of said apparatus." By the second instrument the plaintiff agrees to construct for and deliver to Segal on the premises of the Hub Brewing Company, the apparatus made under the latter's patent owned or controlled by the plaintiff, for the sum of $16,000 to be paid by Segal to the plaintiff in three instalments, one when the material is delivered on the premises, the second thirty days after the date on which the plant is ready to do work, and the last sixty days thereafter.

The substance of the agreement is a sale of a patented refrigerating plant, with the right to use it so far as patents are concerned. The payment of the price is not made a condition of the sale or of the right to use the plant, which, by the express stipulation of the proposal, Segal is to have when the plant is placed within his premises. The language of the proposal, "free from any royalty over and above the purchase money hereinafter specified to be paid to us during and after the completion of said apparatus," will not bear the construction for which the plaintiff

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contends. It is to be read in connection with the previous words of the sentence and in the light of the whole document. The whole sentence means that, in consideration of the sale at the price stipulated, the plant and the free right to use it, and to use as applied to it the plaintiff's patented system, are to go to Segal. Throughout the whole of the two instruments there is nothing but the one expression, "free from any royalty over and above the purchase money," to indicate that the payment to be made partook of the nature of a royalty. If it did, it was open for the plaintiff to give credit absolutely without making the ultimate payment a condition of the purchaser's absolute right to use the machine any more than of his ownership of the plant. The contract does not make the payment of the purchase money a condition precedent as to any feature of the bargain. It is plain that the parties intended the plant to become the absolute property of the brewing company as it should be installed upon their premises, and that the brewing company should have the full and free right to use the plant when placed within their premises, and all in consideration of Segal's obligation to pay the purchase money in the instalments.

As against the brewing company there is no competent evidence that the plaintiff has or controls any patents, or that a royalty was included in the price of the plant. The only mention of patents or of royalties is in the instruments which constitute the contract between the plaintiff and Segal. The brewing company was not a party to that contract, and is not charged with any admission by the terms which the parties to that contract used. Hence the doctrine of *Mann* v. *Williams*, 143 Mass. 394, is inapplicable. Nor is the brewing company in a situation where it is estopped to deny the patents. It has perhaps become the owner of a patented machine; but has not bought it of the plaintiff as a patented machine, nor bought it of any one with the agreement or the understanding that a royalty was to be paid for its use. These circumstances distinguish the present case from *Bartlett* v. *Holbrook*, 1 Gray, 114, and from *Paper Stock Disinfecting Co.* v. *Boston Disinfecting Co.* 147 Mass. 318. Whether the machine is patented or not is immaterial here, if it has been so sold that the present owner can use it without paying royalty. See *Chaffee* v. *Boston Belting Co.* 22 How. 217.

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We have no doubt that the plant became and is, as by the contract between the plaintiff and Segal it was intended to become, a part of the brewing company's real estate. Much is said upon the plaintiff's brief of the contract between Segal and the brewing company, and of the relations between the promoter and the corporation. All this is immaterial, since we are of opinion that if the brewing company had been the purchaser of the plant upon the terms on which it was sold to Segal, the plaintiff would have no right to the relief for which the bill asks.

We understand from the form of the report, and the reservation, that if the bill cannot be maintained against the brewing company, it is to be dismissed. *Bill dismissed.*

HANNAH SULLIVAN *vs.* JOSEPH MARIN.

Middlesex. December 8, 1899. — March 2, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Negligence — Due Care — Questions for the Jury — Evidence as to the Use of Intoxicating Liquors before the Accident.

If, in an action for personal injuries occasioned to the plaintiff by being caught in an elevator, there is evidence that the plaintiff had given a signal for the elevator to come to the floor where he was waiting and that the defendant, operating the elevator himself, opened the door and asked the plaintiff to step in and that he thereupon attempted so to do, that the floor of the car was then six or seven inches above the floor on which the plaintiff stood, and was only two inches thick, and that the car was of such dimensions that when its floor was at the same level as the floor of the hall there was a considerable open space between the threshold of the door giving access to the elevator and the floor of the car, the questions of the care or negligence of both plaintiff and defendant are for the jury.

In an action for personal injuries the defendant offered to show, as affecting the damages only, that prior and up to the time of the accident the plaintiff had been addicted to the excessive use of intoxicating liquors, but the judge excluded the evidence and allowed the defendant to offer evidence that since the time of the injury the plaintiff had been addicted to the use of intoxicating liquors. *Held*, that the evidence rejected was rightly rejected.

TORT, for personal injuries occasioned to the plaintiff by being caught in an elevator owned and operated by the defendant.

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At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

N. D. Pratt, for the defendant.

J. J. Hogan, for the plaintiff.

BARKER, J. There was evidence that the plaintiff had given a signal for the elevator to come to the floor where she was waiting, and that the defendant, operating the elevator himself, opened the door and asked her to step in, and that she thereupon attempted to do so. Also that the floor of the car was then six or seven inches above the floor on which the plaintiff stood, and was only two inches thick, and that the car was of such dimensions that when its floor was at the same level with the floor of the hall there was a considerable open space between the threshold of the door giving access to the elevator and the floor of the car. This made the questions of the care or negligence of both plaintiff and defendant questions for the jury, and the defendant's requests to order a verdict in his favor were rightly refused.

The remaining exception is to the refusal of the court to allow the defendant to show that prior and up to the time of the accident the plaintiff had been addicted to the excessive use of intoxicating liquors. The statement was made in connection with this offer that it was made as affecting the damages only. The court excluded the evidence, but allowed the defendant to offer evidence that since the time of the injury the plaintiff had been addicted to the use of intoxicating liquors.

In our opinion the evidence was rightly rejected. There was no reason shown why the value of the plaintiff's time and labor could not be proved by the evidence commonly introduced to prove such values. If her previous habits had been such as to lessen the probability of her complete recovery, or to prolong or aggravate the suffering caused by her injury, that fact could not be shown in mitigation of damages. *Littlehale* v. *Dix*, 11 Cush. 364. See *Carr* v. *West End Street Railway*, 163 Mass. 360; *Spade* v. *Lynn & Boston Railroad*, 172 Mass. 488, 491.

Exceptions overruled.

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ALDEN FULLER *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. December 11, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Master and Servant — Railroad — Dangerous Appliance — Negligence — Assumption of Risk — Action.

If, in an action against a railroad corporation for personal injuries caused by the bursting of an appliance upon a locomotive engine on which the plaintiff was employed, the only fair inference to be drawn from the whole evidence is that the appliance was put upon the locomotive for a legitimate purpose, that it was of a kind well known and in common use for that purpose, that it was purchased from a well known and reputable maker by whom it had been thoroughly and carefully tested, and that it was the usual course to put it into use in the condition in which it was, without a guard, no negligence on the defendant's part can be found.

In an action against a railroad corporation for personal injuries occasioned, by the bursting of the glass tube of an oiler upon a locomotive engine, to the plaintiff, who had been a locomotive fireman for six months and had run a stationary engine before that, and who knew that the pressure of the steam in the boiler acted in the glass tube of the oiler and was liable to cause the tube to burst, he will be held to have assumed an obvious risk of his employment and to be precluded from maintaining the action.

TORT, for personal injuries sustained by the plaintiff, while in the defendant's employ as a locomotive fireman, by the bursting of the glass tube of an oiler attached to the boiler of a locomotive engine, through the alleged negligence of the defendant. Trial in the Superior Court, before *Gaskill*, J., who, at the defendant's request, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear sufficiently in the opinion.

G. F. Williams, (*J. A. Halloran* with him,) for the plaintiff.

C. F. Choate, Jr., for the defendant.

BARKER, J. In our opinion the court was right in ordering the verdict. The only ground for contending that the defendant was negligent was its having in use the appliance by the bursting of which the plaintiff was hurt. But upon the evidence introduced by the plaintiff that appliance was one well known and in

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common use, and purchased of a well known and reputable maker, by whom all such appliances were thoroughly and carefully tested before being sold for use. While the plaintiff's evidence tended to show that before the time of the accident in very rare instances some kind of a guard had been used upon such appliances, it also showed that generally they were used with no guard. The evidence introduced by the defendant was to the same effect, so that upon the whole evidence the only fair inference to be drawn was that the appliance was put upon the locomotive for a legitimate purpose, that it was of a kind well known and in common use for that purpose, that it was purchased from a well known and reputable maker, by whom it had been thoroughly and carefully tested, and that it was the usual course to put it into use in the condition in which the appliance was, without a guard. The result is that negligence upon the part of the defendant could not be found from the evidence. *Reynolds* v. *Merchants' Woolen Co.* 168 Mass. 501, and cases cited.

Besides this, the plaintiff upon his own evidence must be taken to have known that the glass tube of the oiler was liable to burst from the pressure upon it from within. His own testimony shows that he knew that the pressure of the steam in the boiler acted in the tube. He had been a locomotive fireman for six months and had run a stationary engine before that time, and the necessary inference is that he was familiar with the action of steam. His own statements as a witness, and the undisputed facts as to his knowledge of steam and of appliances similar to the one which burst, were such that he must be deemed to have known that the tube was liable to burst. It was in plain sight and the danger was obvious, and was one of the usual and accepted risks of his employment. *Lehman* v. *Van Nostrand*, 165 Mass. 233. *Bell* v. *New York, New Haven, & Hartford Railroad*, 168 Mass. 443, and cases cited.

Exceptions overruled.

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LOUIS LONDY *vs.* LUCY M. DRISCOLL.

Suffolk. December 15, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Malicious Prosecution — Probable Cause — Credibility of Evidence — Law and Fact.

In an action of tort for the alleged malicious arrest of the plaintiff, the credibility of the evidence and the facts to be drawn from it by inference are for the justice who tries the case without a jury, and the question of probable cause is one of fact.

TORT, for malicious prosecution and arrest. Trial in the Superior Court, without a jury, before *Blodgett*, J., who found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

R. W. Hunter, for the defendant.

W. A. Buie, for the plaintiff, was not called upon.

BARKER, J. The evidence tended to show that the plaintiff was a resident of Boston, with a place of business there upon a well known street, with his name, place of business, and boarding place in the city directory, and that he was assessed for taxes in the city, and that he was actually in Boston about seven months in the year. Also that he was a member of a firm which had a place of business in Chicago, and that previous to the arrest he had travelled all over the country and was away much of the time, and that at the time of his arrest he had an engagement in Providence, Rhode Island, and that very shortly thereafter he went to points outside of the State, and then returned to Boston for ten days, when he went to Chicago, returning to Boston again, and then travelled for five or six weeks both in and out of this State.

The plaintiff and the defendant's husband, who was her agent in procuring the arrest, were the only witnesses. The defendant's husband had been in the plaintiff's place of business in Boston several times, but testified that he supposed that the plaintiff was a resident of Chicago, that he had made inquiries from various parties as to the plaintiff's whereabouts and learned

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that he was in Chicago, and found the plaintiff's name in a list of out of town buyers printed in a Boston newspaper.

It is enough to say, in overruling the exceptions, that the court could give such credence as it chose to the testimony of the defendant's husband, and that even if that testimony was true the court was not precluded from finding, upon all the evidence, that there was no reason on the part of the defendant or of her agent to believe that good cause existed for the plaintiff's arrest on mesne process. There was evidence looking to two conclusions. The credibility of the evidence, and the facts to be drawn from it by inference were for the court which tried the case without a jury, and the question of probable cause was one of fact. *Mitchell* v. *Wall*, 111 Mass. 492. *Donnelly* v. *Daggett*, 145 Mass. 314, 318. *Connery* v. *Manning*, 163 Mass. 44.

Exceptions overruled.

JOSEPH B. KELLEY *vs.* MOSES W. THOMPSON.

Essex. December 15, 1899. — March 2, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Promissory Note — Evidence — Statute of Frauds.

In an action on a promissory note payable in two years, given in payment for the good will in a milk route and personal property used in connection therewith, the maker also agreeing to buy all his milk from the payee at a certain rate a can, which agreement he kept, and paid bills rendered monthly for it at that rate, evidence of an oral agreement that when the note was settled a discount of a certain sum a can on all milk bought after the date of the note should be made and applied thereon contradicts the written agreement contained in the promissory note and is inadmissible; and the statute of frauds, Pub. Sts. c. 78, § 1, cl. 5, is a defence to a declaration in set-off for the amount of such discount.

CONTRACT, upon a promissory note for $500, dated October 1, 1892, payable in two years after date to the order of the plaintiff with interest at six per cent per annum, and signed by the defendant; and also to recover a balance due for milk sold. At the trial in the Superior Court, before *Bell*, J., the jury returned a verdict for the plaintiff, in which the amount of a disputed item in a declaration in set-off was deducted from the balance

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which was agreed to be due to the plaintiff without such deduction; and he alleged exceptions. The facts appear in the opinion.

J. Wiggin, for the plaintiff.

H. J. Cole, for the defendant.

LORING, J. On October 1, 1892, the plaintiff, who was a farmer having a herd of cows "and also the owner of a milk route," sold to the defendant his good will in the milk route, and certain personal property used in connection with it, for $600; the defendant paid $100 of the $600 in cash, and gave his note for the other $500, payable in two years from that date with interest at six per cent per annum. At the same time, the defendant agreed to purchase from the plaintiff all his milk at the rate of twenty-eight cents a can; no time was fixed during which the defendant should take the plaintiff's milk, but, in fact, "the defendant continued to take the plaintiff's milk and pay therefor the price of twenty-eight cents a can from the time of purchasing said route until April 1, 1895, and afterwards, for the six winter months at that rate, and the six summer months at the rate of twenty-four cents. Monthly bills were rendered by the plaintiff to the defendant for the milk purchased, which were paid by the defendant and receipted by the plaintiff." Interest on the note was paid yearly up to and including October 1, 1896.

This suit was brought to collect the amount of the note, with interest from October 1, 1896, and a balance due the plaintiff for milk sold by the plaintiff to the defendant during the five months from April 1 to September 1, 1895, inclusive. The plaintiff died after the bringing of the suit, and the executor of his will was admitted to prosecute. The defendant pleaded the general issue and payment, and also filed a declaration in set-off, in which he counted on an account annexed, including, among other items, the following: "To discount on milk, at four cents per can, $381.68." To the declaration in set-off the plaintiff pleaded the general issue and the statute of frauds. The only item in controversy between the plaintiff and the defendant was this item of the declaration in set-off amounting to $381.68.

The defendant was allowed to prove that as part of the agreement of [illegible] the milk route "it was orally agreed between

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him and the plaintiff that, at the settlement of said note, a discount of four cents per can should be made by the plaintiff to the defendant on all milk purchased by him subsequent to the date of the note, for which he had paid at the rate of twenty-eight cents a can, and that said discount should be applied upon said note; . . . that he was to pay interest upon the entire amount of the note until the note was settled," and "that the allowance of four cents per can on the milk purchased by him at the rate of twenty-eight cents a can was to be made upon the note at the time the note was settled."

The oral agreement testified to by the defendant was not an agreement as to the price of the milk which the defendant was to buy of the plaintiff; it was admitted by the defendant that the agreement was that the price of the milk was twenty-eight cents a can, and monthly bills were rendered by the plaintiff to the defendant at that price and paid by the defendant. The agreement testified to was, that when the note was settled the plaintiff should allow a discount of four cents a can on all milk for which the defendant had paid twenty-eight cents a can, and that that discount should be applied in payment of the note.

As a defence to the count founded upon the note, this oral agreement was not competent; the agreement contained in the note was to pay $500, with interest at six per cent; the oral agreement which the defendant was allowed to testify to was that his obligation was to pay $500 with interest at six per cent, less four cents a can on milk for which he had paid twenty-eight cents a can. This oral agreement contradicted the agreement contained in the note, and for that reason was inadmissible in evidence. *St. Louis Perpetual Ins. Co.* v. *Homer*, 9 Met. 39. *Allen* v. *Furbish*, 4 Gray, 504. *Hall* v. *First National Bank*, 173 Mass. 19. *Wood's Sons Co.* v. *Schaefer*, 173 Mass. 443. The case of *Crosman* v. *Fuller*, 17 Pick. 171, relied upon by the defendant, is not in conflict with this conclusion. In that case, the defendant, when sued upon his note, was allowed to prove that the note had been paid by necessaries furnished by him to the plaintiff; it was a fact that these necessaries had been furnished in pursuance of an oral agreement made when the note was given; but if this oral agreement had been set up before the note had been paid by the delivery of

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which was agreed to be due to the plaintiff without
tion; and he alleged exceptions. The facts ap
opinion.

J. Wiggin, for the plaintiff.

H. J. Cole, for the defendant.

LORING, J. On October 1, 1892, the plainti
farmer having a herd of cows "and also the ow
route," sold to the defendant his good will in t
and certain personal property used in connecti
$600; the defendant paid $100 of the $600 in
his note for the other $500, payable in two year
with interest at six per cent per annum. At th
defendant agreed to purchase from the plaintiff
rate of twenty-eight cents a can; no time was fi
the defendant should take the plaintiff's milk,
defendant continued to take the plaintiff's mil
the price of twenty-eight cents a can from th
ing said route until April 1, 1895, and afte
winter months at that rate, and the six sur
rate of twenty-four cents. Monthly bills w
plaintiff to the defendant for the milk pu
paid by the defendant and receipted by the
on the note was paid yearly up to and
1896.

This suit was brought to collect the amo
interest from October 1, 1896, and a bal
for milk sold by the plaintiff to the def
months from April 1 to September 1,
plaintiff died after the bringing of the su
his will was admitted to prosecute. The
general issue and payment, and also filed
in which he counted on an account an
other items, the following: "To discou
per can, $381.68." To the declaratio
pleaded the general issue and the stat
item in controversy between the plaint
this item of the declaration in set-off a

The defendant was allowed to prov
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nanner and limits
. See *Boston &*
, 164 Mass. 551;
Commissioners, 173

n with costs affirmed.

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necessaries to the plaintiff, to prevent the plaintiff's recovering on the contract set forth in the note, it would not have been admissible.

As the foundation of the defendant's claim in set-off, the proof of this oral agreement is forbidden by the statute of frauds. Pub. Sts. c. 78, § 1, cl. 5. By the terms of the oral agreement the discount was not to be allowed when the milk was delivered but when the note was "settled"; that of course means paid. The note was payable at the end of two years from the date when this oral agreement was made. An oral contract for the payment of money which is, by the terms of the contract, to be paid more than a year after the date thereof is within the statute of frauds, though the consideration therefor is delivered at the date of the contract. *Marcy* v. *Marcy*, 9 Allen, 8. *Frary* v. *Sterling*, 99 Mass. 461. The alleged agreement of the plaintiff to allow a discount to the defendant was, by its terms, an agreement to allow a discount at a time more than a year after the date of the agreement; the agreement being made by word of mouth only, cannot be enforced. Pub. Sts. c. 78, § 1, cl. 5. *Exceptions sustained.*

MAYOR AND ALDERMEN OF NORTHAMPTON *vs.* NEW HAVEN AND NORTHAMPTON COMPANY & another.

Hampshire. January 8, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Grade Crossing — Statute.

If a crossing as it now exists is not in fact a grade crossing, the circumstances that it was once such a crossing and that the grades of the street and the railroad have been separated under proceedings in accordance with Pub. Sts. c. 112, §§ 129 *et seq.*, begun before the passage of the present act to promote the abolition of grade crossings, St. 1890, c. 428, do not make the crossing one with which the Superior Court can deal upon a petition under the last named statute.

PETITION to the Superior Court under the statute relating to abolition of crossings at grade by railroads and other roads. Trial in the Superior Court, before *Stevens*, J., who ruled that St.

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1890, c. 428, does not confer jurisdiction on the Superior Court to further alter a crossing like that referred to in the petition which had been altered by proceedings under Pub. Sts. c. 112, §§ 129 *et seq.*, before the St. of 1890 was enacted, dismissed the petition and reported the case for the determination of this court.

W. G. Bassett, for the petitioner.

J. C. Hammond & H. P. Field, for the respondents.

BARKER, J. The petition was rightly dismissed. The crossing as it now exists is not in fact a grade crossing, and the circumstances that it was once such a crossing, and that the grades of the street and the railroad have been separated under proceedings in accordance with the provisions of Pub. Sts. c. 112, §§ 129 *et seq.*, begun before the passage of the present act to promote the abolition of grade crossings, St. 1890, c. 428, do not make the crossing one with which the Superior Court can deal upon a petition under St. 1890, c. 428, § 1.

The intention of the Legislature to confine proceedings under that section to cases in which the abolition of an actual grade crossing is sought is shown by the language of the section, which relates to such crossings only, and by the fact that the old provisions for the alteration of crossings are left unrepealed. See Pub. Sts. c. 112, §§ 129 *et seq.*

If, owing to the nature and amount of travel upon the street and the nature of the crossing as it now exists, public convenience and necessity require an alteration of the crossing, the language of Pub. Sts. c. 112, § 129, meets the case, and gives the county commissioners power, under a proper petition, to adjudicate upon the necessity, and to decide the manner and limits within which the alteration shall be made. See *Boston & Albany Railroad* v. *County Commissioners*, 164 Mass. 551; *New Haven & Northampton Co.* v. *County Commissioners*, 173 Mass. 12.

Decree dismissing petition with costs affirmed.

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[illegible] entitled to maintain their petition, and no lien [illegible] the building on which the labor was performed [illegible] personal property, the lien claimed [illegible] and the petition must be dismissed. [illegible] building on which the petitioners claim to have performed [illegible] personal property."

The judge ordered [illegible] and found for the petitioners, [illegible] that the [illegible] for the sums named; and the respondents excepted.

[illegible] for the petitioners.

[illegible] for the respondents.

E. Rockwood. The statutes providing for mechanic's liens give the lien only when there was a contract with the owner of the land. St. 1851, c. 179, § 2. Rev. Sts. c. 117, § 1. *Thayer* v. [illegible] 14 Pick. 53. See *Howard* v. *Robinson*, 5 Cush. 213. The lien was extended by St. 1851, c. 343, to cases where the person who made the contract for labor or materials had contracted with the owner of the land for its purchase, "for the purpose of erecting and [illegible] building thereon." See *Donahy* v. [illegible] 3 Cush. 155; *Hardy* v. *Harwell*, 1 Gray, 297. By St. 1857, c. 78, § 2, the lien was further extended to cases in which labor or labor and materials had been "expended in the erection or repair of any building, by virtue of any contract with the owner thereof or some person having authority to contract for such labor," with a proviso that no lien for materials should attach to any building or land, unless, before furnishing the materials, the person claiming the lien had given notice of his intention to claim it to the owner of the land and to the person who had contracted with the owner. It was held, in *Belding* v. *Cass*, 1 Gray, 378, 379, 380, under the statute last cited, that it was the intention of the Legislature "to provide the means for imposing, in behalf of laborers and mechanics, a lien upon real estate only, and not upon personal property."

In the year after this decision the Legislature made a further provision, the language of which made "any building or structure upon real estate" the subject of the lien, as well as the interest of the owner of the building or structure in the lot of land on which it was situated, with a proviso that no lien for materials should attach, unless notice of intention to claim a

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lien was given to the owner of the land if such owner was not the purchaser of the materials. St. 1855, c. 431, § 1. The language of this statute includes all buildings and structures on real estate, whether the buildings are personal property or part of the realty. That it was so intended and understood by the Legislature is apparent from the note reviewing this legislation appended by the commissioners who reported the revision of the laws in the year 1858, which became the General Statutes of 1860, to chapter 150 of their report, in which note they state that, "As the lien may be upon a building or structure the owner of which has no estate or interest in the land upon which it is erected," certain provisions have been altered "so as to provide for a sale in such cases; but as the property in such building might be, and for some purposes is, regarded as personal estate, and as the owner of the land might perhaps require its removal, section 24 [the section giving a right of redemption in real estate sold] has not been extended to such cases." One alteration so made to provide for a sale in cases where the owner of the building or structure has no estate or interest in the land upon which it is erected, was the substitution in § 2 of the words "notice to the owner of the property to be affected by the lien" for the words "notice to the owner of the land," found in St. 1855, c. 431, § 1. Another alteration for the same purpose was the substitution of the words "shall order notice to be given to the owner of the building or structure," in § 14 of the commissioner's draft, for the words "shall order notice to be given to the owner of the land" used in Rev. Sts. c. 117, § 7. So the words, "When the owner of the land shall have failed to perform his part of the contract," found in Rev. Sts. c. 117, § 13, are changed by the commissioners to "When the owner fails to perform his part of the contract," in § 20 of the draft. And in § 27 of the draft, providing for the disposition of a surplus of proceeds of a sale made in enforcing a lien, the words "shall be forthwith paid over to the owner of the property" are substituted for the words "shall be forthwith paid over to the owner of the land," used in Rev. Sts. c. 117, § 20.

The provisions reported by the commissioners were enacted by the Legislature. See Gen. Sts. c. 150, §§ 1, 2, 14, 20, 27. The language of § 1 gives the lien upon "any building or

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structure upon real estate," if the debt is due "by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully acting for, such owner"; and the language of the present statute, Pub. Sts. c. 191, § 1, is the same, save that the words "a building or structure" are used in the latter as the equivalent of "any building or structure." See Pub. Sts. c. 191, §§ 1, 2, 16, 23, 30.

In our opinion this makes it clear that Gen. Sts. c. 150 and Pub. Sts. c. 191 were intended by the Legislature to give a lien upon buildings the owner of which had no estate or interest in the land upon which the building was erected, as well as upon any interest which the owner of a building might have in land on which it might be erected, and that the lien might extend to a building erected upon land although the building was personal property.

The contrary opinion expressed in *Hayes* v. *Fessenden*, 106 Mass. 228, 231, and in *Stevens* v. *Lincoln*, 114 Mass. 476, 478, was not necessary to the decision of either of those cases, and therefore is not binding as an authoritative construction of the statute. In neither of those cases was the building personal property. In the former it was put upon the land by one who had merely a written agreement with the owners of the land for its purchase; and the lien was denied, for the sufficient reason that a person holding such an agreement merely could not charge the building with a lien, because he was not the owner of the building, under the authority of *Poor* v. *Oakman*, 104 Mass. 309. The statements, "If he had had an interest in the building as personal property, the lien would not have attached," to which *Belding* v. *Cushing*, 1 Gray, 576, decided as we have seen before the adoption of the General Statutes, alone is cited, and "The statutes do not contemplate any severance of the building, or a sale of it, or of any interest in it, separate from an interest of the owner in the land itself," were wrong.

So in *Stevens* v. *Lincoln*, 114 Mass. 476, where a lien was denied because by mistake a schoolhouse had been built partly upon lands of the town and partly upon lands of other persons, and it was not shown how much of the work was done on the respondent's land, there was no ground for contending that the

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building was personal property. So much of it as stood on land of other persons than the respondent was the real estate of those persons, and so much of it as stood on the respondent's land was the respondent's real estate; and the ground upon which the exceptions were sustained was, that it could not be shown how much of the work was done upon the building on the respondent's land. The statement, "It is well settled that if a party for whom work is done has an interest in a building only as personal property, the owner of the land never having consented to or authorized such work thereon, no lien can attach thereto, and this because such party has no interest which can be sold so as to render the lien effectual; and further, that it is not contemplated by the statutes that there shall be any severance of the building, or a sale of it or of any interest in it separate from an interest of the owner in the land itself," to which *Belding* v. *Cushing* and *Hayes* v. *Fessenden* are cited, was not necessary to the decision and was misleading.

In our opinion, under the true construction of Pub. Sts. c. 191, § 1, a lien is given upon any building or structure upon real estate, irrespective of the fact whether the building is real or personal property, to any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, or repair of such a building by virtue of an agreement with, or by consent of, the owner of such building or structure, or of any person having authority from, or rightfully acting for, such owner in procuring or furnishing such labor or materials. If the owner of the building has an interest in the land on which the building is situated the lien attaches also to that interest. And under the provisions of Pub. Sts. c. 191, the lien can be enforced by a sale of the building alone, if its owner has no interest in the land on which it is situated, and by a sale of the building and of the interest of the owner of the building in the land, if he has an interest in the land.

In the present case the lease to the respondent required the erection of the building, and so was a consent to its erection on the part of the owner of the land, and as the lease also gave to the respondent an estate for years in the land, this made the respondent the owner of the building within the meaning of

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Pub. Sts. c. 191, § 1, for the term of years at least. We assume further, as the respondent contends, that the terms of the lease have the effect to prevent the building from becoming part of the realty, and that it is the respondent's personal property. Notwithstanding this, the liens of the petitioners attached to the building, and to the respondent's estate for years in the land on which the building is situated, and were properly ordered to be established. *Exceptions overruled.*

MICHAEL McCABE *vs.* ARTHUR E. SHIELDS & another.

Suffolk. January 9, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Superintendence — Negligence — Due Care — Law and Fact — Evidence.

In this case, which was an action under the employers' liability act, St. 1887, c. 270, for personal injuries alleged to have been caused by the negligence of a person in the defendant's service intrusted with and exercising superintendence, the evidence warranted a finding that he was acting as superintendent with the authority and consent of the defendant when the latter was not present, in the directions which he gave to the plaintiff with reference to the work that he was doing at the time of the accident, and that placing a dangerous appliance in the plaintiff's hands with instructions to use it was an act of superintendence, and was negligent; and the questions whether the plaintiff was in the exercise of due care, and whether the accident happened as he contended that it did, were properly submitted to the jury.

In an action under the employers' liability act, St. 1887, c. 270, for personal injuries alleged to have been caused by the negligence of A., a person in the defendant's service intrusted with and exercising superintendence, evidence of a workman in the defendant's shop, as to acts of A. in putting people out of the shop and his language at the time he did it, is admissible as bearing upon A.'s conduct in the shop in matters of control.

TORT, under the employers' liability act, St. 1887, c. 270, against Patrick Shields and Arthur E. Shields, copartners under the firm name of the Shields Foundry Company, for personal injuries alleged to have been caused by "the negligence of the person in the service of the defendants intrusted with and exercising superintendence." Trial in the Superior Court, before

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Fessenden, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that he had been a heavy machine moulder for about twenty-five years; that he entered the employ of the defendants, whose business was making repairs for stoves, on September 28, 1896, and worked there until the day of the accident, which was November 23, 1896; that when he applied to the defendants for work, Patrick Shields said that he would hire him and told him to go to James Hannon, that Hannon was foreman of the foundry and would set him to work; that the plaintiff reported to Hannon, who put him to work; that during the next two months he saw Hannon giving directions and instructing the men about their work; that when they were out of a job they went to Hannon for another one; that Hannon gave him instructions as to the work which he should do during all the time that he worked for the defendants; that Hannon discharged a man while he was there; and that he never saw the defendants or any person other than Hannon giving instructions. He further testified as follows: "On the day of the accident I was working beside Hannon, and had been making different jobs of stove repair. I went to Hannon and asked him what I should make, as I had run out of a job. He gave me this pattern (which was produced) and told me to make five of them. He said the flask I was using was not deep enough, but there were some on his floor that were deeper, but they were not deep enough; that they had no flasks on the premises that were deep enough to make the pattern in; and that when I got the first one made to call his attention and he would show me a remedy that would help to save it, as the flasks were not deep enough. Hannon furnished me with five flasks. After making the mould, I then called Hannon's attention to it, and told him I was ready for him to go and show me what he wanted me to do. He took a piece of iron over with him from his shelf. It was wet and rusty. I saw him take the piece of iron from his bench shelf and punch a hole in the top half of that mould. That piece of iron was between six and seven inches long and about three eighths of an inch thick, with a scale of rust on it. Hannon drove it through the top of the mould from the inside while it was standing on its edge. As he did it, he said I must

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leave this punch back on his bench when I got through with it. He gave me directions regarding the other four. I went and got a weight and placed it on the second one I made. I called Hannon's attention and asked him if that weight would help save them. He said I should use the weight, and I must use the riser also, on the other four; that I must punch the riser in the other four as he showed me how to punch the first one, as well as using the weight. The weight would keep them from lifting up. He told me when I came to pour them I must watch the riser, and when I saw the iron coming up in that riser to pour slow. I put the weight on to keep the metal from forcing the sand up and spoiling the casting. If forced up, the casting would be too thick. I proceeded to make the other four in the same way and then began to fill them. I carried the molten metal in a hand ladle and let it set about two minutes to cool off. Then I poured it into the moulds through the sprue. Nothing happened until I was pouring the fifth mould. This was the one Hannon punched the riser in. It blew up, and the accident happened. The riser and sprue were about two or two and a half inches apart, and while filling the fifth mould I wanted to watch the iron coming up in the riser, and it exploded; sounded like the report of a gun, and shot me in the eye. I had poured about three fourths or more of the metal that it would take to fill the mould. My eye was about three feet from the top of the flask and I did not see the metal in the riser before it flew. I was in a stooping position, watching for the iron to come up in the riser so I would pour my metal slow."

On cross-examination the plaintiff testified as follows: "When iron is ready to be poured it can be poured in a stream from the ladle about the same as warm molasses. A riser is merely a hole which runs from the inside of the mould to its surface. It is necessary to use more or less water in making moulds. The top section of the flask is known as the 'cope,' the section next below as the 'nowel' and the part below is the bottom. I have seen iron weights used on moulds, and used one the day of the accident. The object of putting a riser on a mould is, so far as I know, in machinery moulding, to take the strain off the pattern and to show when the iron comes up; that is, so as not to make the casting too thick by pouring in too much iron. One

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can see when the iron comes up in the riser and so stop pouring. I saw Hannon around the shop, turning iron from the ladles into the moulds almost every day while I worked there. I saw him make some moulds. I never saw him make the whole of a mould, but have seen him make part. It was his custom each day to fill the moulds he made from his own ladle. I have seen him work every day with his own hands. During two or three weeks when I worked near him I saw him around instructing people, allotting out the work and doing anything to be done by the foreman."

Peter F. Cleary, called as a witness by the plaintiff, testified as follows: "I worked for the defendants for fourteen months next prior to the accident. Fourteen men worked there. I have seen Hannon instructing men and giving out work. He told me what to make. He had charge of the shop. I went to him at different times to get what work I wanted. He kept the time of the men. I saw Hannon put people out of the shop several times." The witness was then asked the following question: "Will you tell us what that was, or what you saw him do?" To which he answered as follows: "I have seen him come in there, and he would walk up to them and tell them there was nobody allowed in there; that his orders were to put every man that came in, out." This answer was objected to, but was admitted, and the defendants excepted.

The witness further testified as follows: "I have seen Hannon bring tools to the men to work with. I have seen both Shields' exercising authority in the factory, but no one beside the Shields' and Hannon. I do not see how it was possible to keep tools in that factory without having them rust. Patrick Shields said to a man working on the bench next to me, whom I was showing, 'If you want any instructions, you want to go to the foreman, Mr. Hannon, and he will instruct you.'"

On cross-examination, the witness testified as follows: "Risers are not required on castings of this nature. I have worked as a moulder twenty-seven years without risers. I have seen Hannon a great deal at the defendants', have seen him making moulds. He made moulds and poured iron on the day of the accident. He worked with his hands while he was doing other work. I consider all the labor he did as manual labor. He went around

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the shop and spoke about everything wrong that he saw. He turned his own iron and made his own moulds. Sometimes he would make nearly as many moulds as the rest of the men."

The plaintiff called experts, who testified that the presence of rust in the riser or on the top of the surface of the space in the mould around the riser would be adequate to cause the accident, if the molten iron came in contact with it; that the quantity of rust which would adhere to the sand in the mould in perforating it with such an instrument as Hannon used would be sufficient in quantity, if brought in contact with the molten metal, to cause such an explosion as occurred; and that the accident could be ascribed to no other cause, under the circumstances stated in the plaintiff's evidence. This evidence further tended to show that there was no occasion to put a riser in such a mould; that there was no danger in making the mould; and that it was a perfectly harmless process.

Alexander Patterson, an expert witness called by the plaintiff, testified: "Risers are usually cut with a hollow brass tube when placed on top of the castings. Brass does not accumulate rust; that is the reason for using it. An iron punch is a proper thing with which to perforate a flask for the sake of making a riser. It can be used with safety, if clean."

Wilbert S. Maxwell, another expert witness called by the plaintiff, testified as follows: "*Q.* Assuming that the thing occurred as the plaintiff said it did, I mean under the conditions so far as the mould and the metal and the pattern are concerned, that there was an explosion, that is to say, there was a sound like the shot of a gun and metal flew quicker than it could be seen or its flight appreciated, and struck him in the eye at a distance of three feet or something like that, what would you say as to the cause? *A.* I could not think of anything but rust. I know of nothing else that would cause it. The iron coming in contact with a piece of rust would certainly explode the metal. A little rust might cause it. The iron will not lie against the rust. An iron punch is not a proper thing to make a riser; either a brass or a copper tube should be used; that is to avoid the danger that the presence of rust would create."

Patrick Shields, one of the defendants, testified that he hired the plaintiff, who represented himself to be a first-class moulder;

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that he did not prove to be such a workman, and the witness discharged him, but his son, the other defendant, retained him in their employ; that a moulder could not escape seeing the molten iron in the mould through the riser after it was past the riser, provided he was looking at what he was pouring; that the proper way to stand when filling a mould, to obviate all danger of iron flying, is to rest the ladle handle over one's knee and hold the head away; that it is improper and dangerous to stand bent over the mould and one's head within three feet of the sprue; that Hannon did not have much to do with many of the men in the foundry; that he never hired or discharged, and no one but the defendants had that authority; that Hannon filled his own moulds and lugged his own flasks in the same way as any other man in the foundry did; that there was no difference in the way in which Hannon did his work from that of any other man, with the exception that the men had to go to him to pick out their patterns; that a riser placed in a mould decreases the danger of the mould blowing up or kicking, because it gives extraordinary vent; that it was impossible for the iron to have blown out of the riser owing to rust inside of the riser, if the mould was but three quarters full, because the iron had not got to the surface; that the plaintiff either hit the weight on the mould or some damp iron to cause the explosion; and that it was within the discretion of the moulders in the foundry as to using risers.

On cross-examination, the witness testified as follows: "I did not confer with Hannon about hiring the plaintiff and did not tell him to report to Hannon. Hannon had authority in the absence of myself and son in a certain way, that is, to carry patterns to the men or give them the patterns when they were out of work, when they came to him for them. There was a good deal of time when I was not at the foundry, but not much when my son was away. He was in the foundry and shipping-room during working hours. My son determined how much work was to be done in the foundry, and it was not communicated to Hannon."

Arthur E. Shields, the other defendant, corroborated, in substance, the testimony of Patrick Shields.

On cross-examination, he testified, among other things, as fol-

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It was the duty of the men, in the absence of my father [illegible] to report to Hannon if any of the appliances were [illegible] condition. Provision was made that Hannon had [illegible] in the absence of myself and my father."

[illegible] Hannon testified as follows: "At the time of the acci[illegible] my occupation was moulding, principally. Sometimes [illegible] patterns around to the help, but did nothing more [illegible] giving orders. . . . Arthur Shields or his father [illegible] in the foundry about the general character of the [illegible] in the foundry when the accident happened. The [illegible] punch the riser in the mould in question was not [illegible]. The iron was a round iron, a draw nail, we [illegible] gave the plaintiff his pattern and told him the num[illegible] of it, but nothing more. I heard a report at the [illegible] accident like a cap going off. I cleaned up the iron [illegible] after the accident and there found scraps scattered [illegible] space for a space of ten or twelve feet. In my opin[illegible] were eight or ten pounds of iron there. I went over [illegible]'s floor after the accident and noticed the mould [illegible] at the time of the accident; noticed there was a [illegible] in it, like the one exhibited in court. I dumped the [illegible] shook out the sand, and threw it over, flask and [illegible] part of the casting in the mould. It appeared as [illegible] poured short; was not filled up. This casting had [illegible] about it to indicate that there had been an explosion [illegible] inside of the flask. I know the plaintiff's general cus[illegible]ference to the use of water in constructing the mould. [illegible]n was to wet it thoroughly all around before he used [illegible] warned him against using too much water on his [illegible] the iron, when turned by the moulder from the [illegible] a weight which is damp, the weight being on the [illegible] iron will fly every way. That has occurred to me [illegible] been turning. It is something entirely in the con[illegible] moulder. There is no explosion if he turns the iron [illegible] without hitting the weight. The moulder can see [illegible] of the molten iron through the riser when it fills the [illegible] It is a common occurrence in foundries for iron to fly [illegible] cause or another while moulds are being filled. If [illegible] is turned upon a hard substance, such as the floor

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of a foundry which has been tramped down and is wet, it will fly. From my experience as a moulder and my observation of the casting which was in the mould, or that part of it which was run, I should say the accident happened from the outside of the mould."

On cross-examination, the witness testified as follows: "The molten iron must come in contact with the upper part or roof of the space in the mould before it could come up through the riser. There was a system or method in the way of distributing the work. As a rule, I received my instructions from Arthur Shields and transmitted them to the men. When Patrick and Arthur Shields were absent and did not give authority themselves, the authority, discretion, and judgment were exercised by me. I gave the plaintiff that pattern. There was nothing unusual or extraordinary about this work. I gave him instructions as he asked for them, as he said that I knew more about that kind of work than he did. Weights were provided and used in the foundry. If a weight was required they used it. Risers are used more or less in our foundry, but I do not consider it necessary to use one on that mould. I told him to use one because it acted as a preventive. He could see the iron in the riser quicker; it would save straining the mould. I punched the riser with a draw nail, a piece of iron, something three eighths of an inch thick and five or six inches long. I use iron in perforating holes in moulds, and it never occurred to me that it was dangerous."

Several witnesses, who were employed by the defendants at the time of the accident, testified that Hannon worked the same as the other moulders, and did not exercise any authority over the men except to give them patterns.

The defendants offered evidence of experts tending to show that the iron rust which might have been retained in the bottom of the riser, or upon the top surface of the cavity in the mould, as a consequence of Hannon's punching the riser with the rusty, wet iron rod, could not have caused any of the molten iron to issue from the mould; that the weight was a necessary, proper, customary, and indispensable article for use upon the mould; that in their opinion the only way the accident could have happened was by the turning of a stream of molten iron from the

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plaintiff's ladle upon the surface of the iron weight, or upon the top of the mould, which was wet and hard, thus causing the molten iron to fly up in his face; and that the riser enables the moulder to see the molten iron in the mould when it is being filled, and decreases the danger to the moulder when he is filling it.

The defendants requested the judge to rule that on all the evidence the plaintiff was not entitled to recover. This request was refused; and the defendants excepted.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

G. W. Buck, for the defendants.

J. W. Corcoran, (*W. B. Sullivan* with him,) for the plaintiff.

HAMMOND, J. The accident occurred since the passage of St. 1894, c. 499. There being no question of variance raised in the case, it was sufficient, on the question of superintendence, for the plaintiff to show that Hannon, when neither defendant was present, was acting as superintendent with the authority and consent of the defendants; and we think the evidence sufficient to warrant a verdict for the plaintiff that he was thus acting, in the directions which he gave to the plaintiff, with reference to the work which the plaintiff was doing at the time of the accident. There was evidence tending to show that the presence of rust in the riser, or on the surface of the space in the mould around the riser, would be adequate to cause the accident if the molten iron came in contact with it, and further, that the quantity of rust which would adhere to the sand in the mould, in perforating it with such an instrument as Hannon used, would be sufficient in quantity, if brought in contact with the molten metal, to cause such an explosion as occurred, and some experts testified that the accident could be ascribed to no other cause under the circumstances stated in the plaintiff's evidence. The jury might properly find that Hannon perforated the mould with a rusty instrument and that rust from it adhered to the riser, causing, in connection with the molten metal, the accident.

Without deciding whether the act of perforation was of itself one of superintendence, we think that when Hannon placed this mould thus perforated into the hands of the plaintiff and directed him to use it, he was acting as superintendent, and that the jury

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might properly find that it was negligent in him, as such superintendent, to place this dangerous mould in the hands of the plaintiff. *Malcolm* v. *Fuller*, 152 Mass. 160. *Dean* v. *Smith*, 169 Mass. 569. *O'Brien* v. *Look*, 171 Mass. 36, 41. *Riou* v. *Rockport Granite Co.* 171 Mass. 162, and cases there cited.

The questions whether the plaintiff was in the exercise of due care, and whether the accident happened as the plaintiff claimed it did, were properly submitted to the jury upon the evidence.

The answer of Cleary, as to the acts of Hannon in putting people out of the shop and his language at the time he did it, was admissible as bearing upon the conduct of Hannon in the shop in matters of control.

Exceptions overruled.

BOSTON DAIRY COMPANY *vs.* ELIZA A. MULLIKEN.

Middlesex. January 10, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Goods sold — Instructions — Exceptions — Matter within Discretion of Judge.

No exception lies to the refusal to give instructions in the language requested, if the instructions given sufficiently cover the matter of the requests.

Whether a special question shall be submitted to the jury is a matter in the discretion of the judge, as is also the question whether an account book put in evidence shall go to the jury room.

CONTRACT, upon an account annexed, for milk sold and delivered. At the trial in the Superior Court, before *Bell*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

W. O. Childs, for the defendant, submitted the case on a brief.

E. B. Hale, for the plaintiff.

BARKER, J. There was evidence tending to prove that the milk was sold to the defendant alone, or to the defendant and her sons upon her credit alone, and the writing, "Charge the milk to me and I will pay for it," which the plaintiff's evidence tended to show had been signed by the defendant and delivered to the plaintiff, was relied upon by the latter in support of its

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contention that the milk was sold to the defendant. On the other hand there was evidence tending to show that the milk was sold to the defendant's sons, who were minors, upon the strength of their statement that the defendant would be responsible, and that she signed no writing, and merely told one of her sons that she would be responsible for one week's milk. The declaration was for goods sold and delivered and upon an account annexed containing merely charges for the same goods.

The defendant asked the court to rule that if any credit was given to the sons the promise of the defendant was collateral, and unless in writing would not be binding, and that unless the jury found that the defendant's promise was in writing their verdict should be for the defendant. These instructions were refused, and the jury were told that if they were satisfied that the sons by the defendant's authority made a contract with the plaintiff to sell the defendant the milk and deliver it to her sons the plaintiff could recover, if the sale was to her alone or to her jointly with the sons; but that if they should find that the credit was given to the sons and that the defendant merely contracted to be responsible for the bill, that was not the contract sued upon and the plaintiff could not recover, adding that the contract "Charge the milk to me and I will pay for it" is not a contract of guaranty. The refusal to rule as requested was excepted to, but no exception was taken to the instructions given.

We are of opinion that the instructions given sufficiently covered the matter of the requests, so far as the necessity of a writing, if the defendant's undertaking was a collateral one, was concerned, to which aspect of the case alone the rulings refused were directed.

Whether the special question which the defendant asked to have submitted, "Did the plaintiff give any credit to the defendant's sons?" should be put to the jury was a matter in the discretion of the court. *Spurr* v. *Shelburne*, 131 Mass. 429, and cases cited. So also was the question whether the account book put in evidence should go to the jury room. *Burghardt* v. *Van Deusen*, 4 Allen, 374.

Exceptions overruled.

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AMERICAN MINING AND SMELTING COMPANY *vs.* JAMES W. CONVERSE & others.

Suffolk. January 10, 1900. — March 2, 1900.

Present HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Money advanced — Loan or Executory Purchase — Principal and Agent — Action — Contract — Ratification — Failure of Consideration.

There is a distinction between transactions where the emphasized object is an advance of money, whether to be repaid in money or goods, and those where the object is a sale and where an advance, if made, is only incidental to the purchase and not its end. To receive an advance of the latter sort may be within the power of an agent not authorized to borrow, so far that if the goods are not delivered the advance can be recovered because of the failure of the consideration.

CONTRACT, to recover a balance alleged to be due for money advanced by the plaintiff to the defendants. At the trial in the Superior Court, before *Fessenden*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

B. L. M. Tower, (*E. O. Hiler* with him,) for the defendants.

W. R. Bigelow, for the plaintiff.

HOLMES, C. J. This was an action to recover a balance alleged to be due for cash advanced by the plaintiff to the defendants. The defendants were trustees under a deed of a mine, and lived in Boston. The money was advanced in Colorado to one Armitage, the manager of the mine. The contest is on the authority of the manager to make the defendants liable, and the case is here on exceptions, especially to a refusal to direct a verdict for the defendants. On the testimony the case presented two aspects. One, it almost might be called the more obvious, was that the transactions were not loans in a proper sense, as they are treated by the defendants, but that they were executory purchases of ore in sight, with payments in the mutual account somewhat in advance of the amount of ore received at the moment, but in the expectation of speedy deliveries of ore enough to make the advances good. Ultimately deliveries were prevented by a heavy flow of water into the

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mine. As there was no doubt of Armitage's authority to sell, and as there was evidence that this mode of sale with advances was customary with mine managers in Colorado and was regarded as within the usual scope of their authority, (see also *Robert E. Lee Silver Mining Co.* v. *Omaha & Grant Smelting Co.* 16 Col. 118,) if this view of the case was taken by the jury, they reasonably might find for the plaintiff irrespective of any question of ratification on the ground that the money was advanced to the defendants upon an authorized contract of purchase which fell through, so that there was a failure of consideration and the defendants were bound to refund it. This was the substance of one part of the instructions excepted to, and it was correct. There is a plain distinction, although, as in many other instances, it may be difficult to draw in cases near the line, between transactions where the emphasized object is an advance of money, whether to be repaid in money or in goods, and those where the object is a sale, and where the advance, if it happens, is only incidental to the purchase, not its end. *Gilbert* v. *McGinnis*, 114 Ill. 28, 32, 33.

The other aspect of the case was that the money was borrowed by Armitage. There was evidence that it was borrowed, if it was borrowed, on the personal credit of the defendants. There was evidence also that all the facts, the nature of the arrangement, and the amount of money received, were reported by Armitage to the defendants, and that they replied, made no comments, and seemed satisfied that he was able to go on without drawing on them for more money. The argument for the defendants assumes on the strength of certain testimony that the transactions were, or at least properly were understood by the defendants to be, advances on the ore alone, without personal responsibility. But that was a question for the jury. To say the least, that was not the necessary conclusion from the evidence. The charge of the judge in putting the question of ratification to the jury plainly was dealing with the evidence which showed an arrangement purporting to bind the defendants. The jury were warranted in finding such an arrangement and that it was ratified. *Metcalf* v. *Williams*, 144 Mass. 452. *Harrod* v. *McDaniels*, 126 Mass. 413, 415. *Breed* v. *First National Bank of Central City*, 4 Col. 481, 507.

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It is suggested that the judge erred in saying to the jury that there was direct evidence of a promise by the defendants to pay. But the judge was interrupted by counsel when he made this statement, and thereupon said that he would not undertake to state about the evidence. We think that the statement fairly was understood to be withdrawn, so far as it rested on particulars to which the judge then was referring. He went on to say that if the defendants had placed a person there clothed with apparent authority to do what he did, the defendants would be bound. This of course was true as an abstract proposition, and, as we have said, there was evidence that the managers of mines in Colorado, as such, were understood to have authority to make such contracts as Armitage made. Therefore the instruction was correct, notwithstanding the counter evidence that by Colorado law, managers of mines have no authority to borrow. It also was true, of course, as the judge said, that the fact that the trust deed provided that the defendants should be free from personal liability, i. e. under the deed, did not limit their authority to contract personally with the plaintiff if they saw fit. There is nothing else in the bill of exceptions that requires special mention. *Exceptions overruled.*

CHARLES H. FRENCH *vs.* CAROLINE F. GOODNOW.

Suffolk. January 10, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Poor Debtor — Notice served by Constable — Judgment — Ad damnum.

A notice to a debtor to appear and submit to an examination touching his estate, under Pub. Sts. c. 162, § 18, upon an application for an order for his arrest, may be served by a constable.

While a judgment must not be for damages in excess of the *ad damnum*, it may give costs in addition to that amount.

CONTRACT, against the surety upon a poor debtor's recognizance. Trial in the Superior Court, without a jury, before *Richardson*, J., who refused to make a ruling requested and ruled

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that a constable had authority to serve the notice; and the defendant alleged exceptions, which appear in the opinion.

W. C. Cogswell, for the defendant.

W. Bolster, for the plaintiff.

HOLMES, C. J. The only question in this case is whether a notice to a debtor to appear and submit to an examination touching his estate, under Pub. Sts. c. 162, § 18, upon an application for an order for his arrest, could be served by a constable. The execution was for $286 damages, and $34.37 costs, amounting together to more than $300; and the defendant contends that this execution was beyond the power of the constable to serve, and that the notice was subject to the same limitation.

By § 18 the notice might be served by an officer authorized to serve the execution upon which the application for arrest was founded. But this was amended by St. 1889, c. 415, § 1, which reads: "The notices mentioned in section eighteen . . . shall be served by any officer qualified to serve civil process." If this amendment only means qualified to serve civil process between the parties in the particular case, as contended by the defendant, it is hard to see why it was thought worth passing. We do not so construe the act. We understand the words to be intended to embrace constables, a part of whose business and qualifications it is to serve civil process, (Pub. Sts. c. 27, § 113, St. 1893, c. 423, § 27,) although they are limited in respect of amount, as, for the matter of that, deputy sheriffs are limited in respect of place and otherwise.

Apart from the above mentioned amendment, the service of the notice was good because, so far as appears, the constable had power to serve the execution. The language of the statutes is "may . . . serve any writ or other process in a personal action in which the damages are laid at a sum not exceeding three hundred dollars." St. 1893, c. 423, § 28. Pub. Sts. c. 27, § 114. While a judgment must not be for damages in excess of the *ad damnum*, *Safford* v. *Weare*, 142 Mass. 231, it is clear on theory and is settled by tradition and practice that it may give costs in addition to that amount. So far as appears, therefore, the damages in the original suit may have been laid at $300 or less.

Exceptions overruled.

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HATTIE A. PRATT *vs.* HONORA M. BIDWELL.

Suffolk. January 12, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Writ of Error — Re-trial of Case upon its Merits.

A party cannot re-try his case on writ of error.

WRIT OF ERROR, to reverse a judgment of the Superior Court in a writ of entry. Hearing before *Barker*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

J. T. Wilson, for the plaintiff in error.

No counsel appeared for the defendant in error.

HOLMES, C. J. This is a writ of error upon a judgment of the Superior Court in a writ of entry. The error alleged is that, by mistaken figures in a plan giving a measurement which the scale of the plan showed to be wrong, every one was misled at the trial and the defendant in error recovered a strip of land to which she was not entitled. In short, it is an attempt to re-try a case upon its merits by writ of error, on the ground that the time for review has gone by, and that otherwise the plaintiff in error will suffer wrong. A writ of error has no such function. "A party cannot re-try his case upon error." *Raymond* v. *Butterworth*, 139 Mass. 471. "Error in fact cannot be assigned, where it contradicts the record, and where the matter of fact might have been put in issue and tried, and *a fortiori*, when it is in fact put in issue and tried." *Riley* v. *Waugh*, 8 Cush. 220, 221. *Bodurtha* v. *Goodrich*, 3 Gray, 508, 512. *Gray* v. *Cook*, 135 Mass. 189, 190.

Writ of error dismissed.

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JOHN P. WESTON *vs.* FREDERICK BARNICOAT.

Norfolk. January 12, 15, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Libel — Circulation of Black List by Trade Association — Contract — Evidence — Privileged Communication — Instructions — Action.

If before A. and B. make a contract for a granite monument, A. sends B. a sample of stock, and in reply B. writes that he has decided to give A. the order for the monument, "the same to be made of first quality white Westerly granite," with further requirements, the order is an order by description, and not by sample, and the sample is not a part of the terms of the contract.

In an action for libel against a member of an association who reported the plaintiff's name, upon his refusal to pay a claim of the defendant, to the association, with the result that the plaintiff's name was placed upon a black list, letters written after the action was begun, declining to deal with the plaintiff on the ground that his name was on such list, are admissible in evidence.

That the plaintiff was indebted to the defendant may not be an obstacle to the maintenance of an action for libel in causing the circulation of a black list containing the plaintiff's name, which was reported to an association of which the defendant was a member for that purpose, upon the plaintiff's declining to pay the defendant's claim.

In an action for libel against a member of an association who, upon the plaintiff's declining to pay his claim, reported the plaintiff's name to the association, with the result that his name was placed on a black list, which act caused the discontinuance of business dealings with him by members of the association, all in accordance with its by-laws, it cannot be ruled that the circulation of the black list was privileged.

No exception lies to the refusal to give an instruction in the language requested, if it is sufficiently covered by the instructions given.

If a member of an association reports the name of a debtor who has declined to pay his claim, with the intended result that the debtor's name is placed on a black list, which act causes the discontinuance of business dealings with him by members of the association, in an action by such person against his creditor for libel, the judge rightly refuses to rule that the defendant is not responsible for what the association or its officers did under its by-laws in connection with publishing the plaintiff's name.

TORT, for libel. At the trial in the Superior Court, before *Dunbar*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

G. W. Wiggin & J. E. Cotter, for the defendant.

C. W. Bartlett & E. R. Anderson, for the plaintiff.

HOLMES, C. J. This is an action of tort brought against a member of an association of the type considered in *Hartnett* v.

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Plumbers' Supply Association, 169 Mass. 229, for using the machinery provided by the association's by-laws. The defendant made a claim against the plaintiff for the price of a granite monument, which the plaintiff declined to pay. The defendant thereupon notified the plaintiff that if the plaintiff did not pay he should report the plaintiff's name to the association, to be placed upon its record of those who did not pay their honest debts. The plaintiff not paying, the defendant notified the local secretary, and thereupon the plaintiff received a letter from the association urging him to settle or explain, with a threat of placing his name upon the record if he did not. The consequence of placing a name upon the record or black list was a boycott by the association, as the plaintiff was notified by a copy of the following by-law: "No member of this Association shall quote prices or do any work, either directly or indirectly, for any person or persons whose name appears on the list." The plaintiff did not pay, and a little later his name was placed upon the list with the anticipated result, and with the effect of serious damage at least to the plaintiff's business. The plaintiff thereupon brought this action for causing the circulation of the report, and had a verdict. The case is here on exceptions. It was treated at the trial as an action for libel, so that some questions touched upon in *May* v. *Wood*, 172 Mass. 11, do not arise. In the opinion of a majority of the court the exceptions must be overruled.

1. The defendant set up the truth of the alleged libel, and so the question who was in default under the contract came before the jury. The defendant contended with reference to the quality of the stone used that the contract was by sample, and offered the alleged sample in evidence. It was excluded for that purpose, and, although it was admitted upon other grounds, the court instructed the jury that "the sample was not a part of the terms of the contract," and an exception was saved to the ruling. The contract was made by letters. Before the bargain was made the defendant wrote that he would send a sample of stock and did so. In reply the plaintiff wrote that he had decided to give the defendant the order for the monument, etc., "The same to be made of first quality white Westerly granite." Further on he added: "This job must be free from iron, knots, streaks, or any imperfections and cut as fine as it is possible to cut Westerly

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granite, and first class in every respect." It does not matter whether the contract was made by this letter or only after some further correspondence, as this letter fixed the terms. It seems to us that the order in the words quoted was an order by description, not by sample, and that the ruling was correct. Possibly the fact that the sample had been exhibited might have some bearing on the meaning of "white Westerly granite," and of "first class," so far as it applied to the quality of the stone, but the letter made the test of performance conformity to the words of description used, not conformity to the piece of stone previously shown. In the language of *Pike* v. *Fay*, 101 Mass. 134, 137, cited by the defendant, the writing distinctly defined the article to be delivered.

2. The next exception is to the admission of letters written after the action was begun, declining to deal with the plaintiff on the ground that his name was on the black list. "There can be but one assessment of damages for the cause of action on which this suit is based, and all the damages, those accruing after as well as before the bringing of the action, must be included in it. Evidence as to damages after the date of the writ was therefore rightly admitted. *Fay* v. *Guynon*, 131 Mass. 31." *Wheeler* v. *Hanson*, 161 Mass. 370, 377. The letter embodied the act of refusal which was an example of the precise damage which the libel did and was intended to do. The act was not qualified or made inadmissible by the fact that the letter contained a compliment to the plaintiff. Generally speaking, admissible evidence is not made inadmissible by carrying with it some collateral fact disadvantageous to the other side, which of itself could not be put in proof. Thus, even in a criminal case, where previous disposition or intent is to be proved, the evidence of it is not to be rejected because it may prove another crime. *Commonwealth* v. *Bradford*, 126 Mass. 42, 45. *Commonwealth* v. *Corkin*, 136 Mass. 429, 431. *Commonwealth* v. *Robinson*, 146 Mass. 571, 578, 579. The possibility that the evidence might be manufactured goes to its weight, not to its competency. Such a possibility exists generally after a suit is begun. The plaintiff's testimony imported that the letter was written *bona fide* in the regular course of business and the defendant had the chance to cross-examine him. The letter

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from the plaintiff was not called for, and no objection upon the ground of its not being produced is open.

3. At the end of the charge the court said: "In order to save any misunderstanding the plaintiff wishes me to state: — the fact that there is a debt existing here, or may be a debt here existing between the plaintiff and defendant is not to be considered by you as any obstacle to the plaintiff's recovery in this case. You are to follow the rules which I have indicated in the charge." The defendant excepted, and both sides argue the exception on the footing that the judge gave the ruling asked by the plaintiff, as the words "in order to save misunderstanding" suggested that he was about to do so. But for the form of the bill of exceptions and the agreement of counsel we should have thought from what followed that the judge simply read a request without adopting it, and then for his own view of the law referred the jury to what he had said before. He previously had instructed the jury that if the statement in the publication was true it was justified unless the defendant acted from malevolent motives. But if, as we take it, the ruling asked by the plaintiff was given, the judge showed by the words which he added that he did not mean to modify or revoke what he had said before and what the whole course of the trial made manifest, that the existence of a debt, if there was any, was an element to be considered in deciding whether the defence of truth was made out. Even if there was a debt, however, the plaintiff might have recovered upon one of several grounds: that the publication imported a general habit on the part of the plaintiff of not paying his debts, (whether it had that meaning was one question left to the jury,) or that although there was a debt there was a counter-claim in recoupment which manifestly justified the plaintiff in not paying until it was adjusted, or that the publication was caused with malicious intention.

4. Several rulings were asked on the question of privilege. As we have said, the case is to be considered solely on the footing of libel. From this point of view it is perfectly plain that the judge could not have ruled that the communication was privileged as matter of law. The jury well might have found facts that would cut at the roots of such a ruling. They might have found not only that the proposition that the plaintiff was a

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granite, and first class in every respect." It does not matter whether the contract was made by this letter or only after some further correspondence, as this letter fixed the terms. It seems to us that the order in the words quoted was an order by description, not by sample, and that the ruling was correct. Possibly the fact that the sample had been exhibited might have some bearing on the meaning of "white Westerly granite," and of "first class," so far as it applied to the quality of the stone, but the letter made the test of performance conformity to the words of description used, not conformity to the piece of stone previously shown. In the language of *Pike* v. *Fay*, 101 Mass. 134, 137, cited by the defendant, the writing distinctly defined the article to be delivered.

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from the plaintiff was not called for, and no objection upon this
ground of its not being produced is open.

3. At the end of the charge the counsel said: "In order to
save any misunderstanding, I will state what I mean by the
words [illegible] between the plaintiff and defendant." [illegible]
I do not [illegible] the jury [illegible]

[illegible]

[illegible]

[

man who refused or neglected to pay his honest debts was false, as they have found, but also that it was known by the defendant to be false. They might have found that it was volunteered for malevolent motives. They might have found that the whole organization was a mere scheme to oust the courts of their jurisdiction, and to enforce colorable claims of the members by a boycott intended to take the place of legal process, and that there was no pretence of any duty about the matter. Indeed, it is hard to see how the by-laws or any understanding of the defendant about the by-laws could have afforded him a justification, as the by-laws merely expressed the terms on which he saw fit to enter into a voluntary organization. A man cannot justify a libel by proving that he has contracted to libel. More specifically, a false statement of a kind manifestly hurtful to a man in his credit and business, and intended to be so, is not privileged because made in obedience to the requirements of a voluntary association got up for the purpose of compelling by a boycott the satisfaction of its members' claims to the exclusion of a resort to the courts.

We do not assume that the character of this organization was what we have described. We only say that the jury might have found it to be such, and that the requests for rulings do not exclude that possible view of the facts. Of course we do not mean to say that the statement might not have been privileged if believed to be true, and if the purpose of the association and publication was and was understood to be merely to give information to the members concerning the credit of people with whom they might deal. But none of the requests were limited to such a state of facts. The difficulty in supposing it is that the by-laws expressly require the members to have no dealings with any person whose name is on the list.

5. The fifth request that, if the plaintiff set up the monument, exercised control over it, and retained part of it in Rochester, the contract was not rescinded and the plaintiff was indebted to the defendant when the latter reported his name, was covered by more accurate instructions upon the same point, leaving to the jury as a question for them whether the plaintiff retained the monument for an unreasonable time, or used it in an unreasonable manner. It is to be observed further in this

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connection that the important question was not so much whether the contract was rescinded as whether the defendant had broken it. If the plaintiff had not rescinded but had made a claim in recoupment, that equally would have explained his not paying the bill.

6. It hardly needs to be said that the judge was right in refusing to rule that the defendant was not responsible for what the association or their officers did under their by-laws in connection with publishing the plaintiff's name. The whole and avowed purpose of the defendant in sending in the plaintiff's name was that the officers should do what they did.

Exceptions overruled.

JACQUES VIGEANT *vs.* CITY OF MARLBOROUGH.

Middlesex. January 16, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Raising of a Public Highway by a Street Railway Company — Petition for Damages — Action against City.

On a petition, under Pub. Sts. c. 52, §§ 15, 16, for a jury to assess damages occasioned by raising the grade of a street in front of the petitioner's premises by a street railway company in the construction of its railway, it appeared that the act of raising was that of the railway company alone and was not something done for the purpose of keeping the way safe and convenient for travel; and the evidence did not even show that it was done to the satisfaction of the superintendent of streets, much less that it was done by him or by the city. *Held*, that the judge rightly ordered a verdict for the respondent.

PETITION, under Pub. Sts. c. 52, §§ 15, 16, for a jury to assess damages occasioned by raising the grade of a street in front of the petitioner's premises by a street railway company in the construction of its railway. Trial in the Superior Court, before *Blodgett*, J., who ruled that the claim could not be maintained and directed a verdict for the respondent. The petitioner alleged exceptions, which appear in the opinion.

C. H. Stebbins, (*R. H. Benny* with him,) for the petitioner.

J. W. McDonald, for the respondent.

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BARKER, J. We are of opinion that the verdict for the defendant was rightly ordered. The action of the city government granting the street railway company the right to build its railway along certain streets was not an order for specific repairs or for a change of grade within the meaning of Pub. Sts. c. 49, and if that action had been such an order the present petition could not be maintained, because it was not seasonably brought. The raising of the street in front of the petitioner's premises was the act of the railway company alone, and was not something done for the purpose of keeping the way safe and convenient for travel. The evidence did not even show that it was done to the satisfaction of the superintendent of streets, much less that it was done by him or by the city. *Purinton* v. *Somerset*, 174 Mass. 556. *Exceptions overruled.*

COMMONWEALTH *vs.* JOHN J. CORKERY.

Middlesex. January 16, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Larceny — Copy of Document from Official Files — "Original" — Form of Attestation — Evidence.

Under St. 1884, c. 330, § 8, requiring a foreign corporation having a place of business in this Commonwealth to file a copy of its charter with the commissioner of corporations, and Pub. Sts. c. 169, § 70, providing that copies of documents in certain departments of the Commonwealth, duly authenticated by the officer having charge of the same, shall be competent evidence in all cases equally with the originals thereof, if the genuineness of his signature is attested by the Secretary of the Commonwealth under its seal, a copy of the copy of a charter so filed with the commissioner, duly authenticated by him, has the same effect as the document in his hands, which is the "original," within the meaning of the statute, and is admissible in evidence.

Whether the requirement of Pub. Sts. c. 169, § 70, as to the attestation of the genuineness of the signature of a certifying officer by the Secretary of the Commonwealth, is satisfied by an attestation that, at its date, the certifying officer was such officer, "and that to his acts and attestations, as such, full faith and credit are and ought to be given, in and out of court," *quære*.

Evidence that, about three months before stolen milk cans were found in the defendant's possession under suspicious circumstances, he said to a fellow servant that if the latter was short of cans he could go out and steal them, and that if he did not do it there were others that could do it, is admissible at the trial of an indictment for the larceny of the cans.

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COMPLAINT, to the Third District Court of Eastern Middlesex, for the larceny of milk cans. At the trial in the Superior Court, on appeal, before *Bond*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

A. J. Daly, for the defendant.

F. N. Wier, District Attorney, for the Commonwealth.

HOLMES, C. J. This was a complaint for the larceny of milk cans. The third count was for stealing cans of the property of the Boston Dairy Company. The fourth was for stealing cans of the property of H. P. Hood and Sons. At the trial the other elements of the crime were proved, and the government was allowed, subject to exception, to introduce certificates of the commissioner of corporations purporting to be copies of certified copies of the charter of the Boston Dairy Company as a corporation under the laws of Maine, and the charter of H. P. Hood and Sons, as a corporation under the laws of New Hampshire. According to the certificate, copies of these charters were filed with the commissioner by the corporations concerned, in pursuance of St. 1884, c. 330, § 3, and the copies offered were copies of these copies.

The only objection urged is that the copy is not made evidence by § 1 of St. 1884, c. 330, the act concerning foreign corporations having a usual place of business in this Commonwealth. It may be assumed that that section does not extend to this matter. But by § 3 of the same act such corporations are required to file copies of their charters with the commissioner of corporations, and by Pub. Sts. c. 169, § 70, copies of documents in the executive and other departments of the Commonwealth, (or, by St. 1889, c. 387, of any city or town,) duly authenticated by the officer having charge of the same, shall be competent evidence in all cases equally with the originals thereof, if the genuineness of the signature of such officer is attested by the Secretary of the Commonwealth under its seal. The word "originals" means the documents in the hands of the certifying officer, whatever they may be. Taking this last with the requirement that copies of the charters shall be filed with the commissioner, we are of opinion that one purpose of the statutes is to make the copy deposited with the commis-

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sioner a new source, so to speak, and primary evidence, (subject, of course, to correction,) for the purposes of this State. The duly authenticated certificate of the commissioner establishes the fact that the document in his hands is what it purports to be, and the copy, although a copy of a copy, has the same effect as the document itself.

We draw the whole conclusion from the statutes, but even if the effect of Pub. Sts. c. 169, § 70, were only to give the copy of the copy the same effect as the first copy bearing the attestation of the Secretary of State for Maine or New Hampshire, with the seal of the State, we should be of opinion that the evidence was admissible. The seal of the State and the signature of the Secretary of State accompanying it are self-proving. 1 Greenl. Ev. §§ 4, 479. That the first copy did bear that attestation and seal is established by the certificate, just as the execution of a deed is proved in a proper case by a certified copy from the registry. *Commonwealth* v. *Richardson*, 142 Mass. 71, 74. *Gragg* v. *Learned*, 109 Mass. 167. *Commonwealth* v. *Emery*, 2 Gray, 80, 81. For all that appears evidence may have been put in that by the statutes of Maine and New Hampshire the certificates of organization are part of the public records of the States granting them, and are kept in the office of the Secretary of State. Maine Rev. Sts. c. 48, § 19, and St. 1893, c. 185, § 1. N. H. Pub. Sts. c. 147, § 4. In the absence of evidence these facts might be presumed as a well known practice, coupled with the certificate of the officials to that effect. A party not supposed to have the original documents is not called upon to produce them from another State where they may be presumed to be, when their effect comes in question in this collateral way. As a copy is evidence, a certificate of the public officer having the record in charge sufficiently verifies the document produced as such. *Tapley* v. *Martin*, 116 Mass. 275, 276. The statutes then come in and give equal effect to the copy of the copy, upon the ground that it is convenient and that there is little reason to fear mistakes. See *Stetson* v. *Gulliver*, 2 Cush. 494, 498, 499; *Shutesbury* v. *Hadley*, 133 Mass. 242, 247; *Whiton* v. *Albany City Ins. Co.* 109 Mass. 24, 30.

A question might have been raised on the form of the attes-

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tation by the Secretary of this Commonwealth. The statute requires him to attest the genuineness of the signature of the attesting officer — in this case the commissioner of corporations. His attestation is to the effect that "at the date of the attestation hereunto annexed," a certain person (the certifying officer) was the commissioner of corporations, etc., "and that to his acts and attestations, as such, full faith and credit are and ought to be given, in and out of court." As the same form is used in both cases and was used in the attestation proved in *Commonwealth* v. *Richardson*, 142 Mass. 71, 73, we may assume that it is the form generally adopted by the Secretary of State. We may infer from that that it is intended to satisfy the statute, and therefore to import that the signature is the genuine signature of the officer, although it does not say so. Whether it would be sufficient on that ground, if attention had been called to it, we need not inquire, as the objection taken was a broader one, to the power of the commissioner of corporations to certify at all. If attention had been called to this purely formal matter, very possibly it might have been corrected. The form is not criticised in *Commonwealth* v. *Richardson*.

A second exception taken was to the admission of a conversation of the defendant in February, 1899, with a fellow servant, one Conlon, to the effect that if Conlon was short of cans he could go out and steal them, and that if Conlon did not do it there were others that could do it. The cans in question were shown to belong to the alleged owners, and were found in the defendant's custody under suspicious circumstances not necessary to be detailed. The defendant testified that they were put where they were found about the first of May. Evidence of his animus in February in connection with other circumstances of suspicion was not too remote. Remoteness depends a good deal on the nature of the case. If the remark was found to have been made seriously, it showed that, less than three months before the cans were traced to his possession, the defendant contemplated with complacency the crime with which he was charged. It could not be presumed by the judge that he had experienced a change of heart in the mean time. See *Commonwealth* v. *Quinn*, 150 Mass. 401, 404; *Commonwealth* v. *Goodwin*, 14 Gray, 55. *Exceptions overruled.*

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GEORGE W. PARKE *vs.* CITY OF BOSTON.

Suffolk. January 18, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Taking of Land — Assessment — Equity — Mistake of Fact — Rescission or Reformation of Contract.

A mistake, not with reference to the existence at the time of a certain fact, but simply as to the probability of the occurrence of a future event, is not a mistake of fact within the meaning of that term in the rules in equity concerning the rescission or reformation of a contract. The mistake must be with reference to a fact past or present.

BILL IN EQUITY, filed January 4, 1899, alleging that the defendant took a portion of the plaintiff's land for the widening of Blue Hill Avenue, which had three sewers; that the construction of the street and of the sewers went on together and seemed to be parts of the same work; that the board of street commissioners offered the petitioner $1,628 as their estimate of the amount of damages to his land, while he claimed a much larger sum; that in considering their offer he sought information from the proper officers of the city as to whether local assessments would be laid towards meeting the expense of the work then going on, and was informed that no assessment whatever would be made for it; that considering this he accepted the offer and conveyed the needed land to the city; and that afterwards the city made an assessment on his remaining land of $706.53 for the sewers, and the time had then expired within which he could apply for an assessment of his damages. The prayer was for remedy against the mistake under which he accepted the offer and conveyed the land, by permitting him to refer the question of damages to a jury.

The defendant demurred, assigning among other things as ground therefor want of equity. In the Superior Court a decree was entered that the demurrer be sustained and the bill dismissed; and the plaintiff appealed to this court.

G. W. Parke, pro se.

P. Nichols, for the defendant, was not called upon.

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HAMMOND, J. Even if it be assumed in favor of the plaintiff that the inquiries made by him and the answers given to him were broad enough to cover the case of sewer assessments, and that he would not have settled with the city unless he had supposed that no sewer assessment was to be laid, and even if several other grave objections to the relief prayed for be passed over, it is plain that there is one feature of the case as stated in the bill which is fatal to the plaintiff.

The plaintiff was mistaken as to whether after the settlement he "would not be liable to pay any assessment or contribution towards the cost of the improvements then going on in Blue Hill Avenue or any part thereof except what might be included in his" general annual tax. In so far as his liability depended upon the law authorizing such an assessment and he was mistaken about that, it was a mistake as to the general well known law on the subject and not of fact. And moreover we do not understand the bill to allege that the plaintiff was mistaken about the law. In so far as his liability depended upon any assessment which the proper authorities might thereafter lay and he was mistaken about that, it was a mistake not with reference to the existence at that time of a certain fact, but simply as to the probability of the occurrence of a future event. This is not a mistake of fact within the meaning of that term in the rules in equity concerning the rescission or reformation of a contract. The mistake must be with reference to a fact past or present. Kerr, Fraud & Mistake, (2d ed.) 476. Beach, Eq. Jur. § 49. *Southwick* v. *First National Bank of Memphis*, 84 N. Y. 420.

Demurrer sustained.

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FREDERICK W. POWERS *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. January 19, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Evidence — Due Care.

At the trial of an action for injuries occasioned by an alleged defective step evidence offered by the plaintiff of the condition of the step a month before and a week after the accident, in the absence of evidence that its condition then and at the time of the accident was the same, was properly excluded; and if, after the introduction of evidence that the condition of the step during that period remained unchanged, the offer was not renewed, the plaintiff had no ground of exception.

At the trial of an action for injuries occasioned by an alleged defective step on the side of a locomotive engine the testimony of a master mechanic employed by the defendant as to the condition of the step on the day of the accident was plainly admissible.

At the trial of an action for injuries occasioned by an alleged defective step on the side of a locomotive engine upon which the plaintiff, an experienced brakeman in the employ of the defendant in obedience to an order of the conductor under whose direction he was working, stepped while the engine was in motion, the judge properly instructed the jury that the plaintiff must show that he was in the exercise of due care; that if he undertook to get on the side step of a moving engine he should have taken such a position as due care required of a prudent person in view of the danger to be apprehended from a misstep or any mistake in obtaining a foothold upon the engine; and that if, knowing that there was a safer way to ride upon the engine, he placed himself unnecessarily and without the prudence of an ordinarily careful man in a dangerous position and thereby contributed to the injury, he would not be entitled to recover.

TORT, for personal injuries sustained by the plaintiff while in the defendant's employ. Trial in the Superior Court, before *Bond*, J., who allowed a bill of exceptions in substance as follows. There was evidence tending to show that the plaintiff, who was an experienced brakeman, was in 1893 employed by the defendant as a brakeman in its freight yard in Boston; that on March 31, 1893, the day of the accident, he was ordered by one of the defendant's conductors, under whose orders and directions he was working, to get upon a shifting engine while it was moving at the rate of about five miles an hour; that he ran towards it, grasped two of the handles on the right-hand side of the engine,

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and stepped on the step, which gave way, causing him to fall under the engine.

One Gould, called as a witness by the plaintiff, having testified that he had not seen the step of the engine for a month before the accident, but had examined it a week after the accident, the plaintiff's attorney asked him to state the extent of his examination and the condition in which he found the step. The judge excluded the evidence, and the plaintiff excepted and did not renew the offer of such testimony at any time during the trial.

One Barrett, called as a witness for the defendant, testified that he was a master mechanic in charge of the defendant's shops, and had made an examination of the step in question on May 17, 1893, and found all the bolts and nuts which went through the treads of the step rigid and solid; that he had noticed the step for every day for six weeks or two months prior to that date, because he had occasion to pass the engine five or six times daily on his way to and from the shops, and that the condition of the step in March, April, and May, 1893, and at the time it was exhibited in the court-room was the same.

The engineer in charge of the engine at the time of the accident, called as a witness by the defendant, testified that he was a machinist and understood the construction and repair of an engine; that if bolts on it became loose, it was his duty to tighten them; and was provided with sufficient tools for that purpose; but that the step at the time of the accident was rigid and not loose.

The judge instructed the jury that in order to entitle the plaintiff to recover he must show that he was in the exercise of due care and did not contribute to the accident by his own negligence; that to some extent any misstep by a person who undertakes to get on the side step of a moving engine is hazardous; that if the plaintiff undertook so to do, he should have taken such a position upon the moving engine as due care requires of a prudent person in view of the danger to be apprehended from a misstep or any mistake in obtaining a foothold upon the engine; that if, knowing that there was a safer way to ride upon the engine, he placed himself unnecessarily and without the prudence of an ordinarily careful man in a dangerous position and thereby contributed to the injury, he would not

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be entitled to recover; that if the bolts in the step had become loose or if the bolt heads on the step had been worn off by use, and if it was the duty of the engineer to tighten the bolts or replace them with others, and he had neglected so to do, and if the defendant had provided him with the necessary tools and implements therefor, the negligence, if any, which caused the plaintiff's accident was the negligence of a fellow-servant, for which the defendant was not liable.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

N. L. Foster, for the plaintiff.

W. I. Badger, for the defendant.

HAMMOND, J. 1. We do not see that the plaintiff was prejudiced by the exclusion of the questions to Gould. It does not appear what the plaintiff expected to prove by the answers, but even assuming that the answers would have tended to support the plaintiff's case, there was no offer to show that the condition of the step for a month before or a week after the accident had been practically the same. The judge in the exercise of his discretion might properly exclude the evidence at that stage of the case. If the subsequent evidence, especially that of Barrett, tended to show that the condition of the step was practically the same for a month before or a week after the accident, the plaintiff should have renewed the offer. Not having done that, he has no cause of complaint.

2. The testimony of the witness Barrett was as to the condition of the step on the day of the accident, and was plainly admissible.

3. The rule of due care laid down by the court is to be interpreted with reference to the circumstances, one of which was the fact that the plaintiff was an experienced brakeman, and it was correct.

The plaintiff has not argued his exception to the other portions of the charge, and we do not further notice them, except to say that in substance the court followed the law as laid down in the decisions of this court. *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209, and cases there cited. *Moynihan* v. *Hills Co.* 146 Mass. 586. *Murphy* v. *American Rubber Co.* 159 Mass. 266. *Young* v. *Boston & Maine Railroad*, 168 Mass. 219.

Exceptions overruled.

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ELLEN A. CONEFY *vs.* DANIEL H. HOLLAND.

Middlesex. January 23, 1900. — March 2, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Bastardy Process — Continuance — Motion to Dismiss after Filing of Appearance — Infant — Next Friend.

As complaints under the bastardy act, Pub. Sts. c. 85, are now civil suits, the provisions of Pub. Sts. c. 212, § 26, as to adjournment of trials in criminal cases, do not apply to them, and there seems to be no good reason why they may not be continued as other civil causes.

If, in a bastardy case, a supplemental complaint is filed in the Superior Court, it is too late, after a general appearance for the defendant in that court, to object either to irregularities in the lower court or to the jurisdiction of that court.

It is no defence to a complaint under the bastardy act that the plaintiff, who is a minor, has brought the proceedings in her own name and not by her next friend.

COMPLAINT under the bastardy act, Pub. Sts. c. 85, by a minor sixteen years of age.

At the trial in the Superior Court before *Blodgett*, J., it appeared that in the Fourth District Court of Eastern Middlesex the action was assigned for hearing on November 15, 1897, at which time neither party appearing, it was continued *nisi*, and that on February 17, 1898, it was marked for trial on February 26, 1898, on which day the respondent filed the following motion to dismiss. "First. For the reason that it is improperly marked and assigned for trial here to-day in that on some date after November 15, 1897, said case was continued *nisi*, whereupon said action became discontinued. Second. For the reason that the complainant is a minor and has brought the proceedings in said case in her own name and not by her next friend." The motion was overruled and the defendant was ordered to give sureties for his appearance in the Superior Court. At the trial in that court after said facts appeared, the motion was renewed. The judge overruled the motion; and the defendant alleged exceptions.

J. P. Feeney, for the defendant.

J. L. Powers, for the plaintiff.

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BARKER, J. The first reason alleged in the motion to dismiss, that the complaint in the District Court was at some time continued *nisi* by that court, is not argued by the defendant. As complaints under the bastardy act Pub. Sts. c. 85, are now civil suits, the provisions of Pub. Sts. c. 212, § 26, as to adjournment of trials in criminal cases do not apply to them, and there seems to be no good reason why they may not be continued as other civil causes. The action was entered in the Superior Court and the supplementary complaint filed on October 12, 1898. The bill of exceptions shows that the motion to dismiss in the Superior Court was not filed until some time during the jury trial, in September, 1899, which must be taken to have been after a general appearance for the defendant in that court. When the motion was filed it was too late to object either to irregularities in the lower court, or to the jurisdiction of that court. *Prince* v. *Gundaway*, 157 Mass. 417, and cases cited. This distinguishes the case from *Commonwealth* v. *Maloney*, 145 Mass. 205.

The other ground of the motion to dismiss is that the plaintiff, who is a minor, has brought the proceedings in her own name and not by her next friend. The sole instance in which such proceedings seem by our reports to have been brought by a next friend is the case of *Sayles* v. *Fanning*, 13 Gray, 538. In *McCall* v. *Parker*, 13 Met. 372, the original complaint was brought by a minor herself, and the supplemental complaint made after the birth of the child was made by herself and by her next friend. It was argued for the defendants, in an action upon the bond, that the plaintiff should have proceeded by her guardian or next friend, and not in her own name only. This contention is not specifically treated in the decision, which held that the bond could not be defended against as given under duress. This case is the only one in our reports in which the question whether a minor complainant in such a proceeding should prosecute it by her next friend or guardian has been suggested, although, as in *Davis* v. *Carpenter*, 172 Mass. 167, it not infrequently appears that the complainant is a minor.

Under our present statute it is not necessary that the husband of the mother shall join with her in the complaint. *Sullivan* v. *Kelly*, 3 Allen, 148. No indorsement of the process is required

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in case the complainant removes from the Commonwealth. *Woodman* v. *Jarvis*, 12 Gray, 190.

The proceeding is an anomalous one created and governed by statute. It was no doubt contemplated by the Legislature that in cases arising under the statute complainants as well as defendants might be minors. Minor defendants are given no express authority to execute the bond which the proceedings may require a defendant to give, but it is settled that they can give the bond although minors. *McCall* v. *Parker*, 13 Met. 372, 381. The woman herself is by the statute to make the complaint, and if she neglects or refuses so to do, and only in that case, is it to be made by one of her parents or by her guardian, or by some one of certain designated officials. Pub. Sts. c. 85, §§ 1, 2. The situation is such that the law may well authorize a minor to make and prosecute the complaint herself, without the necessity of finding some one to be responsible as her next friend, and in our opinion such was the intention of the Legislature. If a next friend were required, he would naturally have control of the action. The provisions concerning the withdrawal, dismissal, and settlement of the proceedings make no mention of a next friend, while, if it were necessary that the complaint should be prosecuted by one, the statute would not omit to mention him and define his powers. See Pub. Sts. c. 85, §§ 17–19. *Exceptions overruled.*

JOHN BUFFUM *vs.* YORK MANUFACTURING COMPANY.

Suffolk. November 15, 1899. — March 3, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Breach of Contract — Evidence — Letters as Admissions and as affecting Credibility of Witnesses — Damages.

In an action for breach of an agreement, letters written, after the controversy had arisen, by the plaintiff to the defendant, a corporation, and letters in reply thereto written in its behalf by the defendant's general manager, who in its behalf took part in and conducted the correspondence with respect to the transaction in controversy, are rightly admitted in evidence, those written by the plaintiff being competent so far as they tend to qualify, explain, or aid in the

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construction of those written in the defendant's behalf, and the latter being competent as its admissions; and the defendant is not prejudiced by the instruction that the letters are to be considered by the jury only so far as they contain statements inconsistent with the testimony of the writers, both of whom were witnesses, and that the jury may consider the letters so far as they affect the credibility of those witnesses.

If A. is employed by B. to sell machines made by the latter, and is to be paid as a commission the difference between the selling price which is fixed by him and a price named by the defendant, and B agrees not to sell machines to A.'s customers without his consent at prices less than those named by him to them, and after A. has brought the machine to the notice of C., B sells to C. an incomplete machine for a price a little more than that named by A. for a complete machine without his consent, thus depriving him of a portion of his commission, in an action by A. against B. for breach of the agreement, B is not entitled to have the jury instructed "that there was no evidence that the machine could have been sold for more than the price for which the defendant sold it, and that if they should find for the plaintiff their finding must be for no more than nominal damages."

CONTRACT. The fifth count of the declaration, which is the only one material to be stated, was as follows: "And the plaintiff says the defendant is a manufacturer of machines for making artificial ice; that on or about November, 1892, it entered into a contract with the plaintiff, whereby it agreed to make the plaintiff its agent to procure purchasers for said machines in and about Boston, and to pay him for his services in procuring such purchasers in said territory, as a commission, a price varying according to the size and capacity of said machines; that the amount which the plaintiff was to receive as said commission was to be determined by fixing a price which the defendant was to receive for each of the sizes sold by it, and the plaintiff was to be allowed to fix a sum in advance as the selling price of said machines, varying according to the sizes and capacity; that the defendant should protect the plaintiff in the matter of prices, and should not sell any machines to the plaintiff's customers at prices less than those named by the plaintiff to said customers, without his consent, that for a thirty-ton machine, said advance was not to exceed $2,500; that the plaintiff, on or about November 12, 1894, procured the Dorchester Hygeia Ice Company, of said Boston, as a purchaser of a thirty-ton machine, and fixed the price to be paid by said purchaser at $2,500, in advance of the price to be received by said defendant for a machine of said size, in accordance with said agreement; that the defendant thereupon, in violation of its said agreement, proceeded to complete said sale

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at a price less than the price given to said Dorchester Hygeia Ice Company by the plaintiff, and at a price which deprived the plaintiff of a large portion of his commission upon said sale under said agreement, without the consent or knowledge of the plaintiff; that by reason of said breach of said agreement, the defendant became liable to the plaintiff in damages for the loss of his commission upon said sale, which he would have received under said agreement, and for compensation for his services in procuring said purchaser, and for all damages sustained by the plaintiff caused by the breach of said agreement, which, the plaintiff avers, is said sum of $2,500; and that the defendant owes the plaintiff said sum of $2,500, with interest thereon from the time of said sale."

At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff on the fifth count in the sum of $1,620; and the defendant alleged exceptions, which appear in the opinion.

J. J. Higgins, for the defendant.

J. F. Wiggin, for the plaintiff.

LORING, J. The defendant's first exception is to the admission in evidence of five of its letters written to the plaintiff, dated May 9, 11, October 31, November 6, and November 18, 1895, and of four letters of the plaintiff, to which those five letters were answers; namely, one of May 8, answered by the defendant's letters of May 9 and 11; one of October 22, answered by the letter of October 31; one of November 2, answered by the letter of November 6; and one of November 12, answered by the letter of November 18. The defendant also excepted to one letter written by the plaintiff, dated June 29, which does not seem to have been answered by the defendant. These letters were introduced as part of the plaintiff's original case, and were objected to by the defendant as letters "written after the second machine had been sold and delivered to the purchaser." The defendant now seeks to support its objection to the admission of the plaintiff's letters on the ground that they were written after the controversy had originated, and were objectionable as giving the plaintiff the unfair advantage of a written argument prepared by himself; and it undertakes to support its objection to the introduction of its own letters, on the authority of *Stiles* v. *Western*

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Railroad, 8 Met. 44; *Sumner* v. *M'Neil*, 12 Met. 519; *Tuttle* v. *Brown*, 4 Gray, 457. These cases hold that declarations made by an agent after the termination of his agency are not admissible to affect the rights of his former principal; it is evident that the objection made at the trial was made on the supposition that these cases were applicable; no objection was made at the trial to the introduction of all letters written on one side and the other prior to the sale in question, and objection was made to all letters written after the sale was made. But when, as in the case at bar, the letters are written in behalf of the defendant corporation by its general manager, who took part in its behalf in the transactions in controversy, and who, as general manager, conducted the correspondence in its behalf with respect to those transactions, the letters written by him in the defendant's behalf are competent as its admissions. With the single exception of the plaintiff's letter of June 29, the plaintiff's letters were letters to which the defendant's were answers, and were competent so far as they tended to qualify, explain, or aid in the construction of those letters. *Fearing* v. *Kimball*, 4 Allen, 125. *Trischet* v. *Hamilton Ins. Co.* 14 Gray, 456. The objection that such letters give to the writer the unfair advantage of making an argument in his own behalf was fully considered in those cases, and it would serve no useful purpose to repeat here what was said there. The letter of June 29 does not seem to have been answered by the defendant, but it had no bearing on the litigation, and the defendant could not have been injured by its introduction.

In his charge to the jury, the presiding judge instructed them that the letters were to be considered only so far as they contained statements inconsistent with the testimony of the writers of the letters; namely, the plaintiff and the defendant's general manager, both of whom had testified as witnesses on the stand; and that they might consider the letters so far as they affected the credibility of those witnesses. The defendant was not injured by this instruction. It was certainly proper for the jury to consider the letters in that connection if they did contain inconsistent statements, or if they contained statements which the jury might think inconsistent; and they did contain such statements. The jury might properly have been allowed, under proper instructions, to consider these letters as admissions of

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the defendant, as well as statements affecting the credibility of the witnesses who wrote them. The only exception taken to the charge to the jury as to these letters was the exception to the refusal of the court to rule that "there was nothing on which the jury could find that the defendant had made any statement in conflict with any previous statement, or with any statement or claim which it made at the trial."

The defendant excepted to the ruling of the judge refusing "to instruct the jury that there was no evidence that the second machine could have been sold for more than the price for which the defendant sold it, namely, $26,200, and that if they should find for the plaintiff on the fifth count, their finding must be for no more than nominal damages." No exception was taken to the instructions given as to the measure of damages; and the correctness of the instructions given, except so far as they failed to give the instruction requested, is not before this court. The plaintiff was entitled to reasonable compensation for his services in procuring the sale of the second machine, if he was not entitled to all that the defendant got for the incomplete second machine, on the basis of $26,000 for a completed machine.*

Exceptions overruled.

* It appeared that the plaintiff sold one machine to the Dorchester Hygeia Ice Company for $28,500, the price of which had been quoted by the defendant to the plaintiff at $26,000, and the defendant thereafter paid the plaintiff on account thereof the sum of $2,500; and that subsequently a second machine of the same size as the first was sold to the same purchaser for $26,200. The plaintiff offered evidence tending to prove that the Dorchester Hygeia Ice Company, at the time of the setting up of the first machine, contemplated putting in a second machine if the first should prove satisfactory; that certain parts which were furnished with the first machine were sufficient for both machines; and that the difference in price was accounted for by the fact that certain parts to be furnished as a part of the contract for the first machine were omitted in the contract for the second machine. It appeared that the amount actually received by the defendant from the Dorchester Hygeia Ice Company on account of the second machine was $20,000.

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MARY A. TOLAND *vs.* PAINE FURNITURE COMPANY.

Suffolk. November 24, 1899. — March 3, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Personal Injuries — Defective Condition of Premises — Negligence — Action.

Where, in an action for personal injuries caused by an alleged defective condition of premises which the plaintiff was invited to enter, the evidence is as consistent with the existence of the defect, if there was one, for a few moments only before the accident, as it is with its existence for a longer time, the plaintiff fails to sustain the burden of showing that the defect had existed so long that the defendant in the exercise of reasonable care ought to have known of it and remedied it, and cannot maintain the action.

TORT, for personal injuries occasioned to the plaintiff by falling down a flight of stairs, through the alleged negligence of the defendant in permitting the covering of the floor in its store in Boston, which the plaintiff was invited to enter, to be in a defective condition. At the trial in the Superior Court, before *Gaskill*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts material to the point decided appear in the opinion.

J. Lowell & S. H. Smith, for the defendant.

C. F. Choate, Jr., for the plaintiff.

MORTON, J. The plaintiff was bound to show by a fair preponderance of the evidence that the accident was due to negligence on the part of the defendant. She was herself unable to tell what caused it. But that, as the presiding justice told the jury, was not conclusive against her right to recover, if the accident was in fact due to the defendant's negligence. It is not contended, and it could not be, that the maintenance of the stairway close by the door through which the plaintiff passed, and the neglect of the defendant to warn the plaintiff of it constituted negligence on its part. *Hunnewell* v. *Haskell*, 174 Mass. 557. What the plaintiff relies on is that the small mat between the top of the stairs and the long mat was curled up and out of repair, and worn on the edge next to the long mat, and that that caused her to trip and fall. In order to entitle her to recover on

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that ground she was bound to show that that was its condition at the time of the accident, and that the defendant knew it, or in the exercise of reasonable care ought to have known it, and to have remedied it. The only evidence tending to show such defective condition was the testimony of a witness who examined the mat on the same day several hours after the accident; of another witness who examined it on Monday, the accident having occurred on Saturday, and the testimony of a man in the defendant's employ who had charge of arranging the two rooms on the first floor of the defendant's store, of which the room where the accident occurred was one, and of the carpets, mats, and floors of those rooms, and who testified in substance that he knew what the condition of the mats was about the time of the accident, that he did not notice that the mat was curled up; that he did not notice any change in the condition of the mats, and did not know whether there was any between the time of the accident and the time when they were examined several hours later by the witness referred to above, and that there was no change to his knowledge for a month after. Taking into account the character of the alleged defect, we think that this evidence, if it does not fall short of showing that there was a defective condition at the time of the accident, at least falls short of showing that, if there was such a condition, it had been there so long that the defendant knew or ought to have known of it. The evidence is as consistent with the existence of the defect, if there was one, for a few moments only before the accident, as it is with its existence for a longer time. It does not seem to us, therefore, that the plaintiff has sustained the burden of showing that the defect (if there was one) had existed so long before the accident that the defendant, in the exercise of reasonable care, ought to have known of it and remedied it.

We think that the exceptions should be sustained.

So ordered.

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MARY A. TOLAND *vs.* PAINE FURNITURE COMPANY.

Suffolk. November 24, 1899. — March 3, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

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We think that the exceptions should be sustained.

So ordered.

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WAKEFIELD WATER COMPANY *vs.* NEW ENGLAND TRUST COMPANY & another.

Suffolk. December 4, 1899. — March 3, 1900.

Present. HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Trust Mortgage — Equity.

A corporation, which executes a mortgage of its property in trust, securing an issue of bonds and providing that the holders of certain debenture bonds previously issued by the corporation may exchange them for the mortgage bonds, cannot maintain a bill in equity to prevent the trustee from making such an exchange of bonds for a bondholder, who has deposited his debenture bonds with the trustee and demanded mortgage bonds therefor, prior to a vote of the corporation withdrawing from the bondholders the privilege of making such an exchange and revoking the authority of the trustee to act.

BILL IN EQUITY, filed February 18, 1899, in the Superior Court, to restrain the New England Trust Company from exchanging certain mortgage bonds for debenture bonds of the plaintiff corporation. The Woodstock National Bank was allowed to intervene as a party defendant.

The following facts were agreed: The plaintiff, which is a corporation engaged in the business of furnishing water to the inhabitants of the towns of Wakefield and Stoneham, on or about July 1, 1892, pursuant to a vote of its stockholders, executed and delivered to the defendant trust company a third mortgage of all its property in the sum of $800,000, payable July 1, 1912. The then outstanding indebtedness consisted of a first mortgage for $200,000, dated July 2, 1883, and payable July 1, 1903, to secure an issue of bonds for a like amount; a second mortgage for $300,000, dated May 1, 1886, and payable February 1, 1906, to secure an additional issue of bonds for $100,000 and to provide for the refunding of the first mortgage bonds; and five per cent coupon debenture bonds for $300,000, in three issues of $100,000 each, dated March 1, 1887, September 1, 1889, and October 1, 1889, respectively.

The third mortgage contained, among other things, the following recitals and provisions:

"And whereas, in order to carry out the foregoing arrange-

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ment, it has been deemed desirable that the obligations to be issued under this indenture shall be sufficient to fairly represent the present total bonded indebtedness of said Wakefield Water Company, to wit, the sum of six hundred thousand (600,000) dollars, together with the sum of two hundred thousand (200,000) dollars for the additions and extensions to the works and capacity of the company, present and future, and for payment of any indebtedness or liability of the company now or hereafter existing, in all amounting to the sum of eight hundred thousand (800,000) dollars;

"And whereas, it is a part of this arrangement that three hundred thousand (300,000) dollars of the bonds to be issued hereunder shall be issued only upon the deposit with said trust company of the said three hundred thousand (300,000) dollars of said mortgage bonds as hereinbefore set forth;

"And whereas, it is a part of the arrangement that three hundred thousand (300,000) dollars of the bonds to be issued hereunder shall be set apart for the retirement of said amount of three hundred thousand (300,000) dollars in the five (5) per cent coupon debenture bonds of said company, outstanding as aforesaid, which said bonds shall be exchangeable bond for bond, with equalization of interest, through the said New England Trust Company, the present outstanding five (5) per cent coupon debenture bonds being cancelled by said trust company as soon as received and exchanged.

"The bonds shall be certified and issued by the party of the second part as follows: (1) Three hundred thousand (300,000) dollars as the five (5) per cent coupon debenture bonds hereinbefore specified shall be presented for exchange and cancelled. (2) Two hundred thousand (200,000) dollars as the two hundred thousand (200,000) dollars first mortgage bonds of July 2, 1883, shall be successively deposited with the party of the second part. (3) One hundred thousand (100,000) dollars as the one hundred thousand (100,000) dollars five (5) per cent mortgage bonds of May 1, 1886, shall be successively deposited with the party of the second part. (4) The remainder as they shall be requested by votes of the directors of the party of the first part, stating the purposes as hereinbefore set forth, for which said bonds are required, and upon receiving a copy of said votes duly

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certified the party of the second part shall be under no further or other responsibility whatever as to the issue of said bonds."

On or about July 1, 1892, the plaintiff duly executed its eight hundred coupon bonds of $1,000 each, to the amount in all at par of $800,000, payable to the New England Trust Company, or bearer, in twenty years from that day, and bearing interest at the rate of five per cent per annum, payable semi-annually, being the bonds secured by the third mortgage above mentioned.

On January 9, 1893, the plaintiff executed and delivered $800,000 of new bonds to the defendant trust company, in accordance with the terms of the third mortgage, of which six hundred were for the purpose of refunding the above described outstanding indebtedness of the plaintiff. Since the time of the delivery of the bonds to the trust company, two hundred and seventy-two of the three hundred debenture bonds have been presented to the trust company for exchange for the third mortgage bonds, and the trust company, after executing the certificate above referred to, has made such exchanges. No first mortgage bonds have been exchanged for second mortgage bonds, and no first or second mortgage bonds have been exchanged for third mortgage bonds. The trust company as trustee, and under the terms of the mortgage, now has in its possession three hundred and twenty-eight of the third mortgage bonds.

Of the eight hundred new bonds embraced in the third mortgage, six hundred were intended to replace bonds previously issued and outstanding, and two hundred to provide for the extension of the works or additional construction, and a large part of these two hundred new bonds were issued or negotiated prior to 1897, thereby largely increasing the bonded debt and interest charges of the corporation, so that the interest charges were thereafter in excess of the net income of the corporation.

The directors, in June, 1897, issued a circular to the holders of bonds not secured by the first and second mortgages, requesting them to assent to a reduction of interest on their bonds from five per cent to four per cent, and the holders of all but $15,000 of such bonds assented to such reduction. In November, 1897, the directors issued a circular to the first and second mortgage bondholders, asking them to assent to a like reduction of inter-

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est on their bonds to four per cent, and informing them that thereafter only four per cent interest would be paid on such bonds as the coupons matured.

The first and second mortgage bondholders refused to accept this reduced rate, and the second mortgage bondholders thereupon procured the New England Trust Company, as mortgagee, to bring a suit against the plaintiff, praying for an injunction to restrain the payment of any interest whatever on the third mortgage bonds until full interest was first paid and provided for on the first and second bonds, and praying also for the appointment of a receiver, and the trust company obtained such an injunction on June 1, 1898, and caused the same to be served upon the plaintiff.

The Woodstock National Bank, on August 6, 1898, became, and has since been, the legal owner and holder of twenty-five of the debenture bonds of $1,000 each, dated March 1, 1887. On or about September 30, 1898, the bank delivered the bonds to the trust company for the purpose of exchanging the same for an equal number of the third mortgage bonds then and now in the hands of the trust company, and demanded such an exchange of bonds, prior to the passing of the vote hereinafter mentioned.

On or about December 27, 1898, the directors of the plaintiff corporation passed the following vote, and gave the trust company notice thereof on the same day: "Voted, In view of the changes which have occurred in the financial condition of the Wakefield Water Company, since the execution by it of its third mortgage, so called, dated July 1, 1892, that the privilege therein given to the then holders of the debenture bonds of said corporation of converting the same into bonds secured by said third mortgage be and the same hereby is withdrawn, and that no more third mortgage bonds be issued by the New England Trust Company in exchange for outstanding debenture bonds; and that the New England Trust Company, named as mortgagee in said third mortgage, be requested to cause the third mortgage bonds still remaining in its possession to be cancelled; also, voted, That any authority heretofore given by this corporation to said trust company to exchange said third mortgage bonds as aforesaid be and the same is hereby revoked."

On February 13, 1899, the trust company informed the plain-

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tiff that it had been advised by counsel that it was bound in law to make the exchange of third mortgage bonds for debenture bonds as requested by the bank, and that it should make such exchange as "debenture bonds are presented," and also informed the plaintiff that it already had an application for the exchange of some $30,000 of the debenture bonds. The plaintiff thereupon notified the trust company that it would at once apply for an injunction to prevent it from carrying out its intention to make the exchange proposed, and brought this suit for that purpose.

The words following are printed on the face of all the third mortgage bonds: "This bond shall not become obligatory until it shall have been authenticated by a certificate indorsed thereon, duly executed by the New England Trust Company." No such indorsement has yet been made upon the bonds remaining in the possession of the trust company.

At the hearing a decree was entered dismissing the bill with costs; and the plaintiff appealed to this court.

F. A. Brooks, for the plaintiff.

J. L. Stackpole, for the New England Trust Company.

W. Keyes, for the Woodstock National Bank.

BARKER, J. 1. The question is raised by the defendants, whether if the water company had the right to annul the authority of the trust company to issue bonds under the trust of 1892 in exchange for debenture bonds, the vote of the directors of the water company was effectual as an exercise by the company of that right. Upon this point we express no opinion.

2. The vote referred to assumes that the power of the trust company to make the exchange continued up to the time of passing the vote, and that it was thereby withdrawn. But the twenty-five debenture bonds of 1887 owned by the Woodstock National Bank had been presented by the bank to the trust company for exchange in September, 1898, and before the passing of the directors' vote the bank had demanded of the trust company new bonds, the delivery of which alone was necessary to complete the exchange. By the construction which the water company has put upon the trust of 1892, the offer to holders of debenture bonds was open when the bonds of the bank were presented to the trust company for exchange, and when the new bonds were demanded. The bank having delivered up its

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bonds and perfected its right to an exchange, while, upon the plaintiff's construction of the trust, the offer yet remained open, a subsequent withdrawal of the offer could not defeat the right of the bank to have the exchange completed.

Aside from the twenty-five bonds so placed with the trust company for exchange, the agreed facts show that there have been two hundred and seventy-two of the debenture bonds already exchanged. This leaves but three bonds of that kind, and it is not shown that their holders have offered them for exchange, or that they will be so offered. To inquire whether the trust company still has the power to exchange them is very much a moot question; and it is a question in which the holder of those bonds, who is not before the court, has an interest, and in which his rights cannot now be settled in this cause.

For these reasons the decree of the Superior Court is affirmed.

So ordered.

AMOZ SMITH *vs.* ELLEN N. SMITH, executrix.

Bristol. December 7, 1899. — March 3, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Will — Appeal — Suit by Creditor against Executor — Statute of Limitations.

In case of an appeal from a decree of the Probate Court allowing a will, the two years, within which an executor shall be held to answer to the suit of a creditor of the deceased under Pub. Sts. c. 136, § 9, begin to run from the date when the decree of the Probate Court is affirmed.

CONTRACT, against the executrix of the will of John B. Smith. Trial in the Superior Court, without a jury, before *Hammond*, J., who ruled that the action was not barred by the special statute of limitations applicable to executors and administrators and found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

W. H. Powers, for the defendant.

H. M. Knowlton, for the plaintiff.

LORING, J. The sole question presented in this case is whether the plaintiff's right of action against the defendant

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as executrix of the will of John B. Smith is barred by Pub. Sts. c. 136, § 9, providing that "No executor or administrator, after having given due notice of his appointment, shall be held to answer to the suit of a creditor of the deceased, unless such suit is commenced within two years from the time of his giving bond for the discharge of his trust, except as hereinafter provided."

The will of John B. Smith was allowed, and the defendant was appointed executrix thereof, by decree dated December 11, 1891; on the same day, the executrix gave bond for the discharge of her trust, and the bond was approved; the defendant gave notice of her appointment within the time specified in the statute. On December 19, 1891, an appeal was taken to the Supreme Judicial Court from the decree allowing the will, and on February 7, 1893, the decree appealed from was affirmed. This suit was begun on January 23, 1895.

While the appeal was pending, that is, from December 19, 1891, until February 7, 1893, a period of thirteen months and nineteen days, there was no executor of the will of John B. Smith who could be sued, and no person who if sued had the right to defend the suit in behalf of his estate. The effect of an appeal from a decree of the Probate Court appointing an executor is to suspend the authority of the person appointed to act as such. Pub. Sts. c. 156, § 12. *Arnold* v. *Sabin*, 4 Cush. 46. In *Arnold* v. *Sabin* it was held that one who had been appointed in the Probate Court an administrator of an estate could not maintain a petition against a person suspected of concealing property of the deceased, while an appeal was pending from the order appointing him administrator; and it was so held on the ground that "by the appeal from the decree of the judge of probate appointing Sabin administrator, his authority as such administrator was suspended." 4 Cush. 46, 47. To the same effect see *Boynton* v. *Dyer*, 18 Pick. 1, 4; *Dunham* v. *Dunham*, 16 Gray, 577; *Gale* v. *Nickerson*, 144 Mass. 415, 416. The statute in force when *Arnold* v. *Sabin* was decided, (Rev. Sts. c. 83, § 43,) was amended by St. 1860, c. 189; but it was held in *Dunham* v. *Dunham*, 16 Gray, 577, 579, that the effect of the statute in this connection was not changed by the amendment.

While the appeal is pending the power of the executor is sus-

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pended; any acts done by the executor before the appeal is taken are good. *Dunham* v. *Dunham*, 16 Gray, 577. When the decree is affirmed on appeal, the decree allowing the will "shall [in the words of the statute] thereafter be of full force and validity." Pub. Sts. c. 156, § 12.

Though it is not necessary to decide that point in this case, yet it is desirable to lay down in this connection a definite rule, easy of application, and we are of opinion that the two years begin to run from the date when the decree of the Probate Court is affirmed. It would perhaps be more logical to hold that the time during which the powers of the executor or administrator are suspended should be excluded, and that the time before and after that period should be added to each other in determining whether the two years have run in a particular case. But the statute contemplates the two years running continuously, and the rule which we have laid down is in accordance with the policy of Pub. Sts. c. 136, § 17, which provides that, in case an administrator or executor dies, resigns, or is removed, and a new administrator is appointed, a creditor shall have two years in which to bring suit after the new administrator has given bond for the discharge of his trust, unless the action had been barred prior to the termination of the previous administration. The conclusion to which we have come is supported by the opinion of Story, J., in *Trecothick* v. *Austin*, 4 Mason, 16, 25–29.

Exceptions overruled.

EUDORA T. BARKER *vs.* SOPHIA M. MACKAY.

Suffolk. December 11, 12, 1899. — March 3, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Writ of Entry to recover Land Sold for Taxes — Evidence.

The owner of land sold for taxes may, after payment or tender of the amount due within the time prescribed by St. 1888, c. 390, § 57, recover the land by a writ of entry, and the remedy by a bill in equity under St. 1888, c. 390, § 76, is not exclusive.

At the trial of a writ of entry evidence of a conversation on the demanded prem-

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ises between the daughter of the demandant sent by him to collect the rent and the husband of the tenant, acting as her agent, in which he told her that she had no right to be on the premises or to collect the rents, is admissible for the purpose of showing the possession of the tenant.

A party is not prejudiced by the admission of immaterial evidence which, at the close of the case, the jury is instructed to disregard.

WRIT OF ENTRY to recover a parcel of land in Boston. Trial in the Superior Court, before *Bell*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that the land in question was, on October 3, 1889, conveyed to the demandant by one O'Connor; that on September 17, 1890, it was sold by public auction to the tenant for the non-payment of the taxes assessed thereon for 1889; that the demandant, within two years after the sale, tendered to the tenant the amount due for the unpaid taxes; and that from October 3, 1889, until July, 1895, the demandant was in possession of the demanded premises and collected the rents thereof.

For the purpose of showing that the tenant was in possession of the demanded premises from July, 1895, until the trial of the action the demandant, subject to the exception of the tenant, offered in evidence a conversation between the demandant's daughter who had been sent by her mother to collect the rent and the tenant's husband on the demanded premises in which he told her that she had no right there, that he wanted her to get out, and that she had no right to collect the rent.

For the purpose of showing that the tenant's husband acted as her agent, the demandant offered evidence tending to show that the property was bid off at the tax sale by him with her knowledge and consent; that he borrowed for her money with which to pay for the tax title which she subsequently repaid; that she consulted him when the tender was made by the demandant and again, upon his return from abroad, after she had in his absence paid the taxes in 1891, and that after the conversation between him and the demandant's daughter, and while the tenant still held the tax title, he caused the house on the land to be put in repair for occupancy.

The tenant denied that her husband was her agent, and her husband testified that she refused to have anything to do with the property until the title should be settled; that he expended

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his own money in putting the house in repair, and held the rent which he received for whomsoever might be determined to be the owner.

At the close of the evidence the judge excluded as immaterial certain evidence which had been earlier admitted in support of the claim made by the demandant in her opening that the husband of the demandant had conveyed the premises to the husband of the tenant upon an oral agreement to convey them to the demandant, and that the tenant, at the time the land was sold for taxes, had money belonging to the demandant which she ought to have used to pay the taxes, and refused to let the demandant go to the jury on the issues raised thereby. The tenant requested the judge to rule that the action could not be maintained since the remedy was by a bill in equity in the Supreme Judicial Court, but the judge refused so to rule, and the tenant excepted.

The jury returned a verdict for the demandant; and the tenant alleged exceptions.

E. H. Pierce, (*W. N. Poland* with him,) for the tenant.

W. H. Baker, for the demandant.

MORTON, J. This is a writ of entry to recover certain premises held by the tenant by a tax title. There was evidence of a tender by the demandant of the amount due as required by the St. 1888, c. 390, § 57, within two years after the sale. There was a verdict for the demandant, and the case comes here on exceptions by the tenant to certain rulings by the presiding justice and to the admission of certain testimony.

We shall consider only the exceptions on which the tenant relied at the argument before us, treating the others as waived.

The tenant contends in the first place that the demandant's remedy is by bill in equity in the Supreme Judicial Court under the provisions of St. 1888, c. 390, § 76. We do not see why this contention is not disposed of by *Rand* v. *Robinson*, 11 Cush. 289, in which it was held that the remedy afforded by St. 1849, c. 213, § 2, from which through successive re-enactments the St. 1888, c. 390, § 76, was derived was cumulative to that by a writ of entry, "and was intended to confer the additional remedy of a bill in equity" in cases of redemption from tax sales. That statute was repealed, it is true, by St. 1856, c. 239, § 6, but the

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provisions of § 2 were re-enacted in § 4 of the statute of 1856, with the proviso that "relief be sought within five years from such sale." Manifestly, the proviso would have no effect on the cumulative or exclusive character of the remedy by bill in equity. The provisions of St. 1856, c. 239, § 6, have been continued by successive re-enactments to the present time. We see no ground on which it can be contended that the remedy is solely by bill in equity. See *Barker* v. *Mackay*, 168 Mass. 76.

The tenant further contends that the conversation between the demandant's daughter and the tenant's husband in July, 1895, was inadmissible. We think that it was rightly admitted. There was evidence tending to show that the property was bid off at the tax sale by her husband for the tenant with her knowledge and assent if not at her request; that he borrowed money for her to pay for the tax title which she paid back; that when the tender was made she consulted with him regarding it; that she paid a subsequent tax bill in his absence, and on his return consulted him about that also; and that some time after the conversation between the demandant's daughter and the husband, and while the tenant still held the tax title, the husband caused the house to be put in repair for occupancy. There was also evidence of other transactions between the tenant and her husband and others in regard to the property before the tax sale. The tenant denied that her husband was her agent, and the husband testified that his wife refused to have anything to do with the property till the title was settled, and that he expended his own money in putting it in repair and held the rent that he had received for whoever might turn out to be the owner. But whether the husband was acting as agent for his wife at the time of the conversation objected to seems to us to have been under the circumstances thus disclosed a question for the jury. It was for the jury to give such weight to the testimony of the husband and wife as they deemed it fairly entitled to and to decide what the evidence fairly tended to show. We think that it cannot be held that there was no evidence justifying them in finding, as they must have found, that the husband was acting as his wife's agent. See *Arnold* v. *Spurr*, 130 Mass. 347.

The evidence which was admitted in support of that portion of the demandant's opening to which the tenant objected was

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subsequently ruled out as immaterial, and the demandant was not allowed to go to the jury on the issues raised by it. It is to be presumed that the jury disregarded it. The tenant does not appear to have been harmed by the course that was pursued. See *Clark* v. *Boston & Maine Railroad*, 164 Mass. 434.

Exceptions overruled.

HENRY W. AYERS *vs.* ARTHUR W. HATCH & others.

Suffolk. December 14, 1899. — March 3, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Civil Service — Veteran — Removal of Assessor by Mayor.

An assessor is not a veteran holding an office or employment in the public service of the city of Everett within the meaning of St. 1896, c. 517, § 5.

The removal by the mayor of the city of Everett of a person from the office of assessor for "the good of the service," is valid under the charter of that city.

PETITION, filed May 1, 1899, against the mayor, the seven aldermen, the city clerk and city treasurer of the city of Everett, and William W. Partridge, for a writ of mandamus to determine whether the petitioner or Partridge was an assessor of that city. At the hearing before *Morton*, J., it appeared that the petitioner, a veteran of the civil war, was duly appointed and confirmed as an assessor of Everett for the term of three years, and that he entered upon his duties on April 21, 1897, and continued therein until January 16, 1899, when the respondent Hatch, the mayor, removed him, without a hearing, by the following order: "I have this day removed you from the Board of Assessors. I do this for the good of the service."

The judge reported the case for the consideration of the full court, such disposition to be made of it as should seem meet.

E. R. Anderson, (*C. W. Bartlett* with him,) for the petitioner.

H. H. Newton, for the defendants.

MORTON, J. The first question is whether the petitioner is a "veteran holding an office or employment in the public service" of the city of Everett within the meaning of St. 1896, c. 517, § 5.

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We think that he is not. It is plain, it seems to us, that the statute was intended to provide for the preference of veterans in the offices and employments coming within the scope of St. 1884, c. 320, commonly known as the civil service act, and the acts in amendment thereof, and that the provisions of § 5 apply to veterans who hold offices and employments under and pursuant to the statutes relating to civil service and the rules established by the civil service commissioners. Section 1 defines the word "veteran" as used in the act. Sections 2, 3, and 6 relate to the examination and appointment of veterans to positions "in the public service classified under chapter three hundred and twenty of the acts of the year eighteen hundred and eighty-five and acts in amendment thereof and the civil service rules thereunder, subject to such rules," and to their employment "in the labor service of the Commonwealth and of the cities and towns thereof" under rules established by the civil service commissioners. Section 4 contains directions to the commissioners respecting the preparation of lists of applicants for positions in the public service who have passed the examinations, and of those who have been certified for appointment or employment. Then comes § 5, and it seems to us that it would be wresting it from its connection and giving to it an effect that it was not intended to have to hold that it was intended to apply to any veteran who was in the public service of a town or city in an office or employment of a civil nature. The more reasonable construction is, we think, that it was intended to prevent the removal or suspension or transfer without his assent and without a full hearing of a veteran who had been appointed under the statutes and rules relating to the civil service; thus continuing to him after his appointment the same preference over others who were not veterans, as before his appointment.

We find nothing in the various veterans' preference acts to lead us to suppose that a different result was intended. They are all embraced in St. 1896, c. 517, and are repealed by § 8 of that act and need not therefore be further considered. St. 1887, c. 437; St. 1889, c. 473; St. 1894, c. 519; St. 1895, c. 501.

Neither do we find anything in the civil service act or in the amendments thereto which leads to a contrary result. The first provision in regard to preferring veterans is in the civil service

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act itself. St. 1884, c. 320, § 14, cl. 6. Manifestly this refers to offices coming within the scope of that act and no others. Section 15 excludes elective officers amongst others from the operation of the act. From an early period in the history of the Commonwealth the office of an assessor has been elective and still is. 11 Plymouth Col. Rec. 42. 2 Mass. Col. Rec. 152. Prov. St. of 1692–93, c. 28, 1 Prov. Laws (State ed.) 65. St. 1785, c. 50. Rev. Sts. c. 15, § 33. Pub. St. c. 27, § 28.

Assessors did not therefore come within the original civil service act of 1884. The only amendment affecting the question which we are now considering is St. 1893, c. 95. By that statute the word "elective" in § 15 of St. 1884, c. 320, was stricken out and the words "who are elected by the people or a city council" were inserted, so that it now reads "Judicial officers and officers who are elected by the people or a city council," etc. "shall not be affected as to their selection or appointment by any rules made as aforesaid." The object of the amendment evidently was to define with greater certainty what was meant by the word "elective," and the words "who are elected by the people" signify, it seems to us, officers whom the people are and have been accustomed to elect. Assessors are obviously such officers. Moreover, it is to be observed that "the civil service statutes and rules relate only to certain subordinate offices and employments," (*Brown* v. *Russell*, 166 Mass. 14, 15,) and the intention to subject the office of assessor to them in any case should be plain and unmistakable.

The remaining question is whether the removal was valid under the city charter, which provides that "any officer so appointed (i. e. by the mayor) may be removed by the mayor for such cause as he shall deem sufficient and shall assign in his order of removal, and the removal shall take effect upon the filing of the order therefor in the office of the city clerk and the service of a copy of such order upon the officer removed, either personally or at his last or usual place of residence." St. 1892, c. 355, § 29. The petitioner was appointed by the mayor.

The charter provides that "the mayor shall be the chief executive officer of the city, and the executive powers of the city shall be vested in him, and be exercised by him either personally or through the several officers and boards in their respec-

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tive departments, under his general supervision and control." St. 1892, c. 355, § 26. The responsibility for the due and proper administration of the affairs of the city is thus placed largely upon the mayor, and consistently therewith he is given the power of removal. The fact, however, that removals are to be for cause, repels the idea of removal at pleasure, even though the sufficiency of the cause is for him to decide. The question then arises, what jurisdiction has this court in regard to removals? The answer it seems to us, is this. Cause implies, we think, a reasonable ground of removal, and not a frivolous or wholly unsatisfactory or incompetent ground of removal. If the cause assigned is a reasonable one, then, whether under the circumstances it is sufficient to justify a removal, is for the mayor to decide and his decision is final. But whether the cause assigned constitutes, of itself, as matter of law, ground for removal, is a question for this court to determine. In the present case the cause assigned was "the good of the service," and manifestly it seems to us, that was good ground for removal. The natural inference would be that in some respect the petitioner had failed to perform his duties or was incompetent or inefficient, or was an unsuitable person for the position to which he was appointed. If the charter provided (as in the New York case relied on by the petitioner (*People* v. *New York*, 19 Hun, 441; *People* v. *Nichols*, 79 N. Y. 582; *People* v. *New York Fire Commissioners*, 12 Hun, 500)) that removals should be "for cause and after an opportunity to be heard," no doubt he would have been entitled to a particular statement of the grounds embraced in the cause assigned. But we do not see how it can be said that the cause assigned is not in law a ground for removal.

The result is that we think that the petition should be dismissed.

So ordered.

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H. W. CHILD *vs.* BOYD AND COREY BOOT AND SHOE MANUFACTURING COMPANY.

Suffolk. December 14, 15, 1899. — March 3, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Master and Servant — Immoral Conduct not justifying Discharge — Law and Fact.

Immoral acts or misconduct exhibiting moral turpitude on the part of a person employed as a salesman do not necessarily, as matter of law, render him unfit to continue in his employment or justify his discharge therefrom.

CONTRACT, to recover damages for an alleged wrongful dismissal from the defendant's employ. Answer: a general denial. The defendant, on motion of the plaintiff, also filed two specifications of defence as follows: 1. Intoxication of the plaintiff, and a visit by him to a house of ill-fame in Cincinnati, Ohio, and public association with a prostitute between August 8 and 15, 1896, thereby rendering him an unfit person to continue in the defendant's employ, and incapable of performing his duties under the contract during that period. 2. Failure of the plaintiff to perform his duties under the contract between August 17 and 19, 1896, in consequence of the misconduct alleged in the first specification. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows.

The defendant employed the plaintiff under a written contract, which provided that he was to enter its service as its chief salesman on or before April 22, 1896, and continue therein until the first Saturday of December, 1897, at a salary of $3,300 a year. On December 7, 1896, the defendant terminated the contract and dismissed the plaintiff, but paid him his salary for December, 1896 January, and a part of February, 1897. There was evidence tending to show that on Sunday, August 9, 1896, the plaintiff, while in the defendant's employ, visited a house of ill-fame in Cincinnati, drove publicly through the streets with one of its occupants, and drank freely of intoxicating liquors; but that the knowledge of his misconduct did not come to the defend-

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ant until after the final payment to the plaintiff in February, 1897.

The defendant requested the judge to rule, 1. If there is in fact a good cause of discharge, the employer is justified in discharging his servant, although at the time of the discharge he does not know of the existence of such cause for discharge. 2. Misconduct exhibiting moral turpitude, although causing no damage to the employer, is a good cause for discharge. 3. Moral misconduct, although causing no special pecuniary damage to the employer, is a good cause for discharge. 4. If the plaintiff, while in the employ of the defendant, visited a house of ill-fame in Cincinnati on Sunday, and was seen, before or after the visit, publicly driving with one of its occupants who was a woman of bad repute, his discharge from the service of the defendant was justified, although at the time of the discharge the defendant had no knowledge of such misconduct.

The judge gave the first ruling requested, but refused to give the others; instructed the jury that, as matter of law, the conduct of the plaintiff did not justify his discharge, and gave full instructions relative to causes relied on in the second specification of defence, and to other issues, to which no exception was taken.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. W. Bartlett, (*P. B. Runyan & E. R. Anderson* with him,) for the defendant.

E. R. Thayer, for the plaintiff.

MORTON, J. The plaintiff entered the employment of the defendant under a written contract, which provided that he was to be its chief salesman at a salary of $3,300 per year from, on, or before April 22, 1896, to the first Saturday of December, 1897. On December 7, 1896, the defendant terminated the contract and dismissed the plaintiff.

The grounds relied on in justification are, (1) dissipation, rendering the plaintiff an unfit person to continue in the defendant's employment, and incapable of performing his duties between August 8 and 15, 1896, and (2) failure on the plaintiff's part to perform his duties from August 17 to August 19, 1896, in consequence of such dissipation.

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The defendant asked certain rulings, of which the first was given and the second, third, and fourth were refused. The case comes here on exceptions to the refusal to give the three rulings, and also on exceptions to the charge.

As we understand the rulings that were refused, the court was asked to rule that "any moral misconduct," or "any misconduct exhibiting moral turpitude" on the part of a servant was good ground for dismissal, and that the misconduct of the plaintiff in visiting on Sunday a house of ill-fame in Cincinnati, while in the defendant's employment, and publicly driving with its occupant, justified his dismissal.

The first request asked the court to rule that, if at the time of discharge a good cause in fact existed, though the employer did not know it, that was sufficient to justify the discharge. The court gave this ruling, and a similar one with which the fourth request concluded.

If there are cases, on which we express no opinion, where "any moral misconduct" or "any misconduct exhibiting moral turpitude" would justify a discharge, we think that this was not one of them. The test is, it seems to us, not morality in the abstract, but whether, taking the nature of the plaintiff's employment into account, the acts complained of rendered the plaintiff unfit to perform the duties which he had undertaken, and we think that it could not be held, as matter of law, that "any act of moral misconduct" or "any misconduct exhibiting moral turpitude" on the part of a seller of boots and shoes, necessarily rendered him unfit to continue in the employment of a corporation engaged in that business. For the same reason we think that it could not be ruled that his conduct on Sunday justified his discharge. It is true that the specifications allege the plaintiff's unfitness for the further performance of his duties by reason of the dissipation which is described. But the trouble with the requests was that they asked the court to rule that any immorality on the plaintiff's part, and his conduct on Sunday, were sufficient without more to warrant his discharge. If the defendant intended to rely on the contention that the plaintiff's immorality was so gross as to unfit him properly to perform his duties, or calculated to injure the defendant's business if he continued in its employment, we think that it should have called the atten-

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tion of the court to it by suitable requests or in some other mode. As it was the court evidently understood, and we think rightly, the defendant's contention to be that any immoral conduct or any misconduct indicating moral turpitude and his conduct on Sunday justified, without anything more, his discharge. For reasons already given we do not think this was so.

The exceptions state that full instructions were given in reference to the second ground relied on in justification of the discharge and to other issues to which no exception was taken.

We think that the exceptions must be overruled. See *Freeman* v. *Bourne*, 170 Mass. 289; *Ulrich* v. *Hower*, 156 Penn. St. 414; *Milligan* v. *Sligh Furniture Co.* 111 Mich. 629; Wood, Master & Servant, (2d ed.) § 110; Smith, Master & Servant, (4th ed.) 139 *et seq.* *So ordered.*

LOUIS M. PACKER *vs.* THOMSON-HOUSTON ELECTRIC COMPANY.

Essex. January 8, 9, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Defective Machine — Assumption of Risk — Evidence — Negligence — Trial — Instructions.

If experienced experts testify for the defendant in an action for personal injuries that a certain movement of a machine which caused the injury was impossible, the plaintiff cannot be said, as matter of law, to have assumed the risk of its happening.

If a question to a witness is objected to, no reason being given for the objection, and an exception taken, and no objection is made to the answer, a ground for the objection being taken in this court which was not taken at the trial nor in any way called to the judge's attention, the question itself not being objectionable, and no motion being made then or afterwards to strike out the answer, the exception will be overruled.

Evidence that a machine, which was so constructed that it would not repeat its movement without coming to a full stop or start from a full stop, if it were in order, was out of order and not safe to run, that it started from a full stop after it had repeated, and that the repeating was reported by the person who was employed on the machine and was injured by such movement, will warrant a finding of negligence on the part of the employer in an action for the injury.

It is not the duty of the judge presiding at a trial to select the undisputed facts in

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the case and state to the jury what their verdict should be upon those facts, unless the disputed facts are immaterial to the issue.

In an action for personal injuries caused by an alleged defective machine, A., who examined the machine soon after the accident, testified that he found several specified defects in it; that, taking the condition in which he found it, he should say that it was an unfit machine to be used just then; and that "it was not safe to run it, as it would not stop at every revolution." The defendant's witnesses testified that these defects would not cause the machine to start from a full stop, but there was evidence that the machine with these defects did so start, and caused the injury. *Held*, that the jury could not properly be instructed that "if the defects in the machine, as ascertained and described by A., were all that existed at the time of the accident, the plaintiff cannot recover."

TORT, for personal injuries sustained by the plaintiff, through the alleged negligence of the defendant, while in its employ. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

R. M. Morse & J. M. B. Churchill, (*J. Duff* with them,) for the defendant.

C. W. Bartlett & E. R. Anderson, for the plaintiff.

LATHROP, J. The machine on which the plaintiff was injured is what is known as a Cranston and Jones undercut machine, which is so fully described in *Martineau* v. *National Blank Book Co.* 166 Mass. 4, that we do not consider it necessary to describe it again at length. It is enough to say that above a steel table were two shafts, in the grooves of which ran a clamp. Underneath the table was a knife. Both the clamp and the knife were worked by machinery. Power was applied by means of a shipper, and two motions were required to set the machinery in motion: one a motion to the right, and then a downward motion. The object of the two motions was to prevent the application of power by the accidental pressure of the body of the person operating the machine upon the shipper. The machine was so constructed that when in proper working order it would make but one cut, and then stop, and the shipper would come back into place.

On the morning of the accident, May 11, 1895, the plaintiff was at work on the machine, cutting elastic braid, which was explained at the argument to mean braid to be used in insulating wire. When the machine was to be used for cutting paper, cardboard, or other stiff material, it was pushed from the rear of

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the machine, by a helper, over the knife which was then below the table, and the person operating the machine would then pull it along, until the required length was reached, the power was then applied and the cut made. In the case of elastic braid, however, there was evidence that this could not be done; and that the recognized way in the defendant's factory was for the operator to put his hands between the uprights and draw the braid towards him. This evidence came not only from the plaintiff but from two other men who had worked on the machine. There was contradictory evidence on this point, but the question was for the jury. While the plaintiff was drawing the braid through, after having made a cut, there was evidence that the machine started from a dead stop, the clamp came down, and the knife arose and cut off both his arms below the elbow.

The principal question in the case arises on the refusal of the judge below at the close of the evidence to direct the jury to return a verdict for the defendant.

At the argument before us the counsel for the defendant conceded that there was evidence for the jury on the question of due care on the part of the plaintiff; but it was contended that the plaintiff assumed the risk. On this point there was evidence that on the morning of the accident the machine had repeated several times; that is, that, instead of stopping after one revolution, the clamp would come down, the knife ascend, and so on for a number of times. This the plaintiff knew, and he testified that he reported it. No one was called to contradict him on this point. It is evident that if he had attempted to put his arms between the uprights while the machine was repeating, there could be no question of his assuming the risk. But there was evidence for the jury that the plaintiff did not know that the machine could start from a dead stop. In fact the chief effort of the defence was to show by experts that, although the machine, in the condition it was in immediately after the accident would repeat, it was impossible for it to start from a dead stop. Some of these experts were men of great experience, both theoretically and practically; and if they pronounced a thing to be impossible, we do not see how the plaintiff can be said, as matter of law, to have assumed the risk of its happening. See *Donahue* v. *Drown*, 151 Mass. 21.

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The next question is whether there was any evidence of negligence on the part of the defendant. Bearing on this is the question of the admissibility of a question put to one Graham, who had previously worked on the machine. He testified that he made an examination of the machine in 1893. He was then asked: "Immediately after this examination . . . what did you see the machine do?" The question was objected to, and the defendant took an exception. The witness answered: "Well, I did n't see it do much of anything for a minute or so, and then I saw it start from a stop." No objection was made to the answer; nor was any reason given for the objection. The defendant now contends that the condition of the machine was different at the time of the accident from its condition in 1893. The only difference relied on is that in 1894, the friction strap broke, and the defendant manufactured a new one, which the experts for the plaintiff thought was not so good as the old strap, and the experts for the defendant thought was as good as the old, or better. No such objection as is now made was made at the trial, nor was the judge's attention in any way called to it. The question itself was not objectionable, and no motion was made then or afterwards to strike out the answer. We are of opinion that this exception must be overruled. Graham testified, without objection, that he reported the fact that the machine repeated and started from a stop to the foreman in charge of the shop; and the foreman was not called to contradict him.

There can be no doubt that there was evidence of the defendant's negligence. There was certainly evidence that the machine started from a stop, after it repeated, and that the repeating was reported by the plaintiff. There was also evidence that the machine was so constructed that it would not repeat or start from a dead stop, if it were in order, and there was evidence that it was out of order, and not safe to run. Whether or not the defects which were found were sufficient to start the machine from a dead stop was a question for the jury. The jury were instructed that the plaintiff could not recover unless he proved that the machine started of itself from a full stop. As they found for the plaintiff, they must have found that it did so start. The jury may well have found evidence of negligence on the part of the defendant. *Donahue* v. *Drown*, 154 Mass. 21. *Mooney* v. *Con-*

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necticut River Lumber Co. 154 Mass. 407. *Connors* v. *Durite Manuf. Co.* 156 Mass. 163.

It remains to consider certain requests made by the defendant which the judge refused to give, and which were insisted upon at the argument. These are the first, second, third, and seventh.

The first, second, and third may be considered together. These are as follows: "1. There is no dispute that if the counterbalance weight is in its proper position it will keep the shipping lever from falling to the right, and causing the clutch to engage with the coil." "2. It is not claimed that the machine could have started itself at the time of this accident unless the counterbalance weight was out of position so as not to be able to perform its proper function." "3. There is no evidence that at the time of the accident this counterbalance weight was so out of position."

We are of opinion that these instructions were properly refused. The plaintiff did not concede the assumption of either the first or second request. But even if the fact assumed was not disputed, it was not the duty of the court "to select the undisputed facts in the case, and state to the jury what their verdict should be upon those facts, unless the disputed facts were immaterial to the issue." *Kellogg* v. *Tompson*, 142 Mass. 76, 80. See also *Hannah* v. *Connecticut River Railroad*, 154 Mass. 529, 534.

The seventh request was this: "If the defects in the machine, as ascertained and described by Weiss, were all that existed at the time of the accident, the plaintiff cannot recover." Weiss was a witness for the plaintiff, and examined the machine soon after the accident. He testified that he found that the friction strap was improperly constructed; that the two screws in the shipper bracket were loose; and that the end of the clutch spring was worn. He also testified as follows: "Taking the condition I found this machine in, I should say it was an unfit machine to be used just then. Of course it was not safe to run it, as it would not stop at every revolution." Although the defendant's witnesses testified that these defects would not cause the machine to start from a full stop, yet as there was evidence that the machine with these defects did so start, the instructions requested could not properly be given.

Exceptions overruled.

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ANNIE L. PARKER *vs.* CITY OF BOSTON.

Suffolk. January 9, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Defective Highway — Liability of City — "Reasonable Care and Diligence."

If, in an action under Pub. Sts. c. 52, § 18, for injuries occasioned to a traveller on a highway, there is no evidence that the defendant knew of the defect if there was one, in the absence of evidence to show how long it had been there, it cannot be said that the defendant ought, in the exercise of reasonable care and diligence, to have known of it and remedied it.

TORT, for personal injuries occasioned to the plaintiff by an alleged defect in Ruggles Street, a highway in Boston. Trial in the Superior Court, before *Aiken*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

F. R. Rogers & J. Perrins, Jr., for the plaintiff.

S. H. Hudson & P. Nichols, for the defendant.

MORTON, J. The evidence leaves it entirely uncertain how long the alleged defect had existed. One witness testified that she "had been through there Sunday night before, to church." But she did not testify, and does not appear to have been asked, as to the condition at that time. If there was a defect the plaintiff was bound to show either that the defendant knew it, or in the exercise of reasonable care and diligence ought to have known of it in season to remedy it. Pub. Sts. c. 52, § 18. There was no evidence that the defendant knew of the defect if there was one and in the absence of evidence to show how long it had been there it cannot be said that the defendant ought in the exercise of reasonable care and diligence to have known of it and remedied it.

Exceptions overruled.

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PETER A. MARTIN & another *vs.* BOSTON AND MAINE RAILROAD.

Essex. January 9, 10, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Employers' Liability Act — Conscious Suffering — Instantaneous Death — Due Care — Amendment.

If a brakeman is thrown from a slowly moving freight train by a jerk of the train, but by reason of his foot being caught by something on the cars, he is dragged nearly two hundred feet during which he receives but slight bodily injuries, and he is then drawn under the cars, which sever his head from his body, his death is preceded by a period of conscious suffering which cannot be separated from the instant in which he is killed so as to enable his next of kin to maintain an action for his instantaneous death under St. 1887, c. 270, § 2.

A brakeman while descending a ladder at the end of the car at the head or rear end of a freight train, which was being slowly backed by a shifting engine, was thrown to the ground by a jerk of the train, his foot was caught by something on the car so that he was dragged some distance, and then, although the stop signal was given at once and the brakes applied, he was drawn under the cars and killed. *Held*, in the absence of evidence that he was in the exercise of due care, that the train was under-manned, that the cars or track were defective or that those in charge of the train were guilty of negligence, an action could not be maintained by his next of kin under St. 1887, c. 270, § 2. *Held*, *also*, that, if an amendment of the action were authorized, the result would be the same should the action be amended by making his administrator the party plaintiff under St. 1887, c. 270, § 1.

TORT, under St. 1887, c. 270, §§ 1, 2, as amended by St. 1892, c. 260, to recover damages for the death of Richard L. Martin, while in the employ of the defendant. The plaintiffs were the next of kin of the deceased, and were dependent upon him for support. The plaintiff, Peter A. Martin, was the administrator of his estate.

At the trial in the Superior Court, before *Lilley*, J., there was evidence tending to show that the deceased had been employed by the defendant for about two years before his death as a switchman and freight brakeman, and was familiar with the duties of his employment, and with the manner of operating and moving freight trains; that occasionally it was his duty to leave the train while it was in motion and run ahead of it to throw the switch;

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that on the day of the accident, which occurred on June 19, 1893, he was standing at the head end of a freight train composed of an ordinary shifting engine without an air brake and fifteen or eighteen freight cars, each about thirty feet long, which was backing at the rate of four or five miles an hour on a nearly straight track toward a side track near Blossom Street, in Lynn; that when the head end of the train as it was backing was about two hundred and seventy feet from the switch the deceased descended from the top of the car by a ladder at the end nearest to the switch, and when he was on the last step, within two feet of the ground, the train jerked and threw him quickly, his foot was caught by the car and his body fell suddenly toward the ground, but by the use of his hands and arms, upon which he appeared to walk, the deceased kept his body off the ground for about twenty feet; that then it fell to the ground and was pushed by a brake beam about one hundred and sixty feet, until its progress was stopped by the catching of his clothing on the end of a guard rail, and at that point the wheels of the cars severed his head from his body, but his body received very slight bruises.

The conductor of the train, who, when the accident occurred, was sitting at the head end of the train, testified that his attention was first attracted by a shout from a person in an electric car on Blossom Street, when he at once got off the train and gave the stop signal, after which half a minute elapsed before there was any sign of checking the train.

The brakeman who was at the end of the train nearest to the locomotive testified that the first intimation he had of trouble was when he saw the crossing tender running up the track and giving the stop signal rapidly, and when he heard shouts from persons in the electric car to stop the train; that he at once gave the stop motion to the engineer and jumped for the brake. Upon a quick stop signal the train should have been stopped within one and a half times the length of a car.

There was no claim by the plaintiffs' attorney that there was any jerking of the car other than such as is incident to the ordinary motion of a car when backed by a shifting engine.

At the close of the evidence the judge, at the request of the defendant, ruled that the action could not be maintained, and

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directed the jury to return a verdict for the defendant, and the plaintiffs excepted.

The plaintiffs then asked leave so to amend their action that the plaintiff, Peter A. Martin, could sue as the administrator of the estate of Richard L. Martin, but the judge, subject to the exception of the plaintiffs, refused to allow the amendment, and at the request of the parties, reported the case for the determination of this court.

If the ruling were correct upon the pleadings, and if the plaintiffs, were the amendment allowed, would not be entitled to maintain the action upon the evidence reported, the verdict was to stand and judgment to be entered for the defendant.

W. H. Niles, for the plaintiffs, contended that during the time in which the deceased, after his fall from the car, was being dragged one hundred and eighty feet on the ground, there was a period of conscious suffering, and that the injuries to the body then received which were slight, gave a right of action to the administrator of the deceased, but that they were not the cause of the death; that the cause of the death was the severing of the head from the body; that the death was instantaneous, and was the accident for which this action was brought.

W. I. Badger, (*W. R. Peabody* with him,) for the defendant.

MORTON, J. The plaintiffs concede that if the death was with conscious suffering, the action, which is brought under the employers' liability act by the next of kin of the deceased who were dependent on him, cannot be maintained. The accident occupied only a few seconds, and although the second in which the deceased was killed was separated as a point of time from the second in which he fell from the car, the accident was one accident from its beginning to its end, in which the same causes were operating during the brief interval which elapsed between the fall of the deceased and his death. We do not see how without resorting to what would seem to partake of a metaphysical nicety the second in which the deceased was killed can be separated from the second in which he fell and the seconds which intervened between that and the death so as to say that the death was without conscious suffering.

We are also of opinion that if the plaintiffs were allowed to amend, assuming that they could properly be allowed to do so,

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the result would be the same. It does not appear what caused the deceased to fall. There is no presumption that he was or was not in the exercise of due care. For aught that appears the accident may have been due to his own carelessness. Neither do we see any evidence of negligence on the part of the defendant. It is admitted in substance by the plaintiffs that the jerking or jolting of the car when the plaintiffs' intestate fell was incident to the ordinary motion of a car on a train when backed as this was by a shifting engine. The train was being backed slowly, and it does not appear that it was under-manned or that the engine and car or track was defective or that those in charge of the engine and train negligently did anything that they ought not to have done, or omitted to do anything which they ought to have done, after they were warned that something, they did not know what, was wrong.

Verdict to stand; judgment for the defendant.

EDGAR I. McKIE *vs.* EDWARD J. GREGORY & another.

Suffolk. January 10, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Assignment of Legacy as Collateral Security — Promissory Note — Rate of Interest — Request for Instructions — Payment — Tender — Mortgage — Defeasible Assignment of Chose in Action.

On December 24, 1895, A., having lent B. a sum of money, took his promissory note for $100 payable one year after date, to the order of A. with interest thereon payable monthly at the rate of one and a half per cent per month, and at the same rate after maturity, until paid, and also took, as collateral security, an assignment of B.'s interest in the estate of C. deceased, the assignment providing that if B. should pay to A. $100, "with interest, as provided in a certain note of this date, in one year from this day, then this assignment and said note shall be void, otherwise of full force and effect." A. brought an action on December 27, 1897, upon the assignment against C.'s executor under St. 1897, c. 402, which relates to actions upon assigned claims. Shortly before A. notified the executor that the note and interest were unpaid and the executor paid A.'s attorney $100, and was informed that $34.50 of interest was due. After this B.'s attorney tendered to A. $7. The executor offered to prove that the amount of the loan was $75, and not $100, and that the tender of $7, to-

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gether with the $100 paid, equalled the amount of money actually lent, with interest at eighteen per cent per annum, and a sum not exceeding $5 for the expense of making papers. The executor requested rulings, first, that if the jury found in accordance with the offer of proof, the payment and tender would operate as an extinguishment of the debt and a discharge of the assignment and note given as security, and, secondly, that the executor not having been notified of the rate of interest which the note carried, he would be liable for no more than the $100 referred to in the assignment. *Held*, that the first request should have been given, and that the second was rightly refused.

It is not necessary to foreclose an instrument, which is not a mortgage, but a defeasible assignment of a chose in action, which the assignee has a right to collect in case of breach.

CONTRACT, to recover the amount of a legacy assigned to the plaintiff. At the trial in the Superior Court, before *Braley*, J., the jury returned a verdict for the plaintiff in the sum of $34.50, with interest at six per cent since November 16, 1897, and the defendants alleged exceptions, which appear in the opinion.

F. P. Curran, for the defendants.

R. Lund, (*D. E. Gould* with him,) for the plaintiff.

LATHROP, J. The plaintiff seeks to recover from the executors of the will of Christopher Leonard the amount of a legacy left to Thomas Leonard, the son of the testator. On December 24, 1895, the plaintiff lent to Thomas Leonard a sum of money, and received from him a promissory note by the terms of which he agreed to pay to the order of the plaintiff $100, with interest thereon, payable monthly at the rate of one and a half per cent per month, and at the same rate after maturity, until paid. The plaintiff also received from Leonard, as collateral security, an assignment of all his "right, share and title in and to the estate of said Christopher Leonard, deceased." The assignment contained the following clause: "Provided, nevertheless, that if I shall pay to said McKie the sum of $100 with interest, as provided in a certain note of this date, in one year from this day, then this assignment and said note shall be void, otherwise of full force and effect."

This action is brought upon the assignment, under the St. of 1897, c. 402. The writ is dated December 27, 1897. Shortly before this the plaintiff notified the defendants that the note and interest remained unpaid, and one of the defendants paid the attorney for the plaintiff $100, and was informed by the attorney that there was interest due on the note, amounting to

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$34.50. After this interview, an attorney acting for Thomas Leonard tendered to the plaintiff the sum of $7.

The defendants offered to prove that the amount of the loan made by the plaintiff to Leonard was $75 and not $100, and further offered to prove that the tender of $7, together with the $100 already paid, equalled the amount of money actually lent, with interest thereon at the rate of eighteen per cent per annum, and a sum not exceeding $5 for the expense of making said papers; and the defendants asked the court to rule that if the jury found in accordance with the offer of proof the payment and tender would operate as an extinguishment of the debt and a discharge of the assignment and note given as security for the debt.

The refusal to give this request raises the principal question in the case. We are of the opinion that the request should have been granted. The plaintiff has no interest in the legacy except as collateral security for the debt due to him from Leonard. It was competent for the defendants to show the amount "actually borrowed," to use the language of the St. of 1892, c. 428, § 1; and also to show that this amount with interest at the rate stated in the statute, together with a sum not exceeding $5, was either paid or tendered by Leonard, or by some one authorized by him to act. When Leonard by his attorney tendered the $7, it might well be found that he ratified the act of the defendants in paying the $100, if any ratification of their act was necessary. It would hardly be contended that this action could be maintained, if Leonard personally had paid the plaintiff all that he was entitled to under the statute, even though the payment was not made until after the note matured. If this is so, it seems to us clear that on the evidence and the offer of proof the defendants were entitled to the ruling requested. See *Schayer* v. *Commonwealth Loan Co.* 163 Mass. 322; *West* v. *White*, 165 Mass. 258.

The remaining exceptions of the defendants require but a brief consideration. The defendants asked the court to rule that, the assignment being in form a mortgage, the plaintiff could not recover without first having effected a foreclosure "of said mortgage." This ruling the court rightly refused to give. The instrument in question was not a mortgage. *Marsh* v.

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Woodbury, 1 Met. 436. It was a defeasible assignment of a chose in action, which the plaintiff had a right to collect in case of breach. *Taft* v. *Church*, 162 Mass. 527, 532.

The last exception of the defendants is to the refusal of the court to give the following ruling: "The defendants requested the court to rule that the defendants, not having been notified of the rate of interest which the note given by said Thomas Leonard carried, they would be liable for no more than the $100 referred to in the assignment."

The defendants had notice of the assignment, and this showed that it was given as security for a note with interest, and, although the rate was not stated, the notice was sufficient to require the defendants to ascertain the rate.

Exceptions sustained.

JOHN J. MERRIGAN *vs.* FRANK HALL & trustee.

Suffolk. January 11, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Oral Testimony to Contradict Written Instrument — Contradiction of Testimony given on Cross-examination.

At the trial of an action of A. against B. it appeared that B. signed and gave to A., a newspaper publisher, an order in writing requesting him to insert a certain advertisement for one year "for which I will pay the sum of $60. Payable monthly." B. sought to show by oral testimony that A., before the order was signed, agreed to take his pay "in teams." *Held*, that the evidence offered tended to vary one of the express terms of a written contract and was inadmissible. *Held, also*, that A. having testified, on cross-examination, that at the time he received the order for advertising, nothing was said about "teams," B. could not contradict him by showing that something was said and what the conversation was.

CONTRACT, on a written order. The defendant filed a declaration in set-off. At the trial in the Superior Court before *Hardy*, J., the jury found in each verdict the full amount claimed by each party with interest; and the defendant alleged exceptions. The facts appear in the opinion.

J. F. Simmons, for the defendant, submitted the case on a brief.

S. W. Wagner, for the plaintiff.

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LATHROP, J. The defendant signed and gave to the plaintiff, a newspaper publisher, an order in writing, requesting him to insert a certain advertisement for one year, "for which I will pay the sum of $60. Payable monthly." In an action on this agreement, the defendant sought to show by oral testimony that the plaintiff before the order was signed, agreed to take his pay "in teams." This evidence was excluded, and the only exception relied on is to its exclusion.

It seems to us too plain for argument, that the evidence offered tended to vary one of the express terms of a written contract, and was inadmissible. *Richardson* v. *Churchill*, 5 Cush. 425. *Currier* v. *Hale*, 8 Allen, 47. *Russell* v. *Barry*, 115 Mass. 300, 303. *Pike* v. *McIntosh*, 167 Mass. 309.

This is not the case of a collateral oral agreement as to a matter not mentioned in the written agreement, for here the price to be paid is stipulated to be so many dollars, and therefore the case does not fall within *Ayer* v. *R. W. Bell Manuf. Co.* 147 Mass. 46, and *Durkin* v. *Cobleigh*, 156 Mass. 108, where the cases as to collateral agreements are fully considered by Mr. Justice Allen. Nor was the evidence admissible for the purpose of showing the situation of the parties, as in *Adams* v. *Morgan*, 150 Mass. 143.

We are unable to see how the fact that the plaintiff testified that he had "teams" six or seven times from the defendant, after the contract was made, amounts either to a waiver or an estoppel, or as an interpretation of the contract made by the parties, which would prevent the plaintiff from maintaining the action. See *Wilkinson* v. *Blount Manuf. Co.* 169 Mass. 374, and cases cited. But no question of this sort is raised by the exceptions.

The defendant further contends that inasmuch as the plaintiff testified, on cross-examination, that at the time he received the order for advertising, nothing was said about "teams," the defendant was entitled to contradict the plaintiff by showing that something was said, and what the conversation was. The evidence was not offered on the ground that it tended to contradict the plaintiff, and it was excluded on the ground that it tended to vary the terms of the written contract. It is not necessary, however, to rest the case on the ground that there was no offer to contradict the plaintiff. Whether anything was

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said about "teams" at the time the order was received for advertising was entirely immaterial to any issue in the case. The defendant having asked the question, was bound by the answer, and could not raise a new issue by contradicting it. *Eames* v. *Whittaker*, 123 Mass. 342. *Shurtleff* v. *Parker*, 130 Mass. 293. *Phillips* v. *Marblehead*, 148 Mass. 326, 329. *Alexander* v. *Kaiser*, 149 Mass. 321. *Commonwealth* v. *Smith*, 162 Mass. 508. *Carr* v. *West End Street Railway*, 163 Mass. 360.

Exceptions overruled.

WILLIAM GLYNN *vs.* CENTRAL RAILROAD COMPANY.

Suffolk. January 12, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Negligence — Liability of first of two Railroads for Defect in Car.

If, after a car has passed from the hands of one railroad into those of another and before it has reached the place where an accident occurs, it has passed a point at which the cars are inspected, the responsibility of the first railroad for a defect in the car is at an end.

TORT, for personal injuries occasioned to a brakeman employed by the New York, New Haven, & Hartford Railroad Company, while at work upon a train of that road at Stonington, Connecticut, a station twelve miles east of New London. Trial in the Superior Court, before *Aiken*, J., who, at the request of the defendant, directed a verdict for the defendant; and the plaintiff alleged exceptions.

G. W. Anderson, (*S. A. Fuller* with him,) for the plaintiff.

R. Thorne, (of New York,) (*C. F. Choate, Jr.* with him,) for the defendant.

HOLMES, C. J. This is an action for personal injuries. The plaintiff was at work for the New York, New Haven, and Hartford Railroad Company, at Stonington, Connecticut, and was engaged in coupling a train to a car belonging to the defendant when his sleeve was caught by a bolt projecting from the deadwood of the car and his hand was crushed. We assume that the car was in such a condition that, apart from the question of

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notice, it would have warranted a finding that the defendant was liable, had the car been in its possession and the plaintiff in its employ. We assume further, without deciding, that the evidence warranted a finding that the car had come from the possession of the defendant recently, and in the same condition as that in which it was at the time of the accident. But nevertheless we are of opinion that the judge who tried the case was right in directing a verdict for the defendant.

There was no dispute that after the car had come into the hands of the New York, New Haven, and Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point, if not before, we are of opinion that the defendant's responsibility for the defect in the car was at an end.

There is more obscurity than there ought to be, perhaps, upon the limits of liability in general. The fact that the damage complained of would not have happened but for the intervening negligence of a third person has not always been held a bar, although negligent conduct, so far as it is a tort, is unlawful in as full a sense as malicious conduct, and although ordinarily even a wrongdoer would not be bound to anticipate a wilful wrong by a third person. See *Elmer* v. *Locke*, 135 Mass. 575, 576, and cases cited in *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, 48; *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240. Compare *Hayes* v. *Hyde Park*, 153 Mass. 514, 515, 516. But when a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed.

Thus the case of *Clifford* v. *Atlantic Cotton Mills*, just cited, shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given up to a lessee who, if he does his duty, will keep it safe. In the case at bar the car did not threaten harm to any one, unless it was used in a particular way. Whether it should be used in a dangerous way or not depended not upon the defendant but upon another road. Even assuming that the car had come straight from the defendant at Harlem River, the defendant did no unlawful act in handing it over. Whatever may be said as to the

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responsibility for a car dispatched over a connecting road before there has been a reasonable chance to inspect it, after the connecting road has had the chance to inspect the car and has full control over it, the owner's responsibility for a defect which is not secret ceases. See *Sawyer* v. *Minneapolis & St. Louis Railway*, 38 Minn. 103; *Wright* v. *Delaware & Hudson Canal Co.* 40 Hun, 343; *Mackin* v. *Boston & Albany Railroad*, 135 Mass. 201, 206.

Upon the same principle, that commonly when a new control comes in the former responsibility is at an end, a vendor who makes no representation is not liable to a remote purchaser of the article sold, for damage done by defects in it. *Davidson* v. *Nichols*, 11 Allen, 514, 518. *Losee* v. *Clute*, 51 N. Y. 494. *Curtin* v. *Somerset*, 140 Penn. St. 70. *Necker* v. *Harvey*, 49 Mich. 517, 519. An extreme case is *Collis* v. *Selden*, L. R. 3 C. P. 495.

It is recognized in *Clifford* v. *Atlantic Cotton Mills*, that the rule is different when the use from which the damage ensued plainly was contemplated by the lease. *Jackman* v. *Arlington Mills*, 137 Mass. 277. *Harris* v. *James*, 45 L. J. Q. B. 545. See *Devlin* v. *Smith*, 89 N. Y. 470. In *Heaven* v. *Pender*, 11 Q. B. D. 503, 515, it was considered that the use not only was contemplated but was invited. See *Blakemore* v. *Bristol & Exeter Railway*, 8 El. & Bl. 1035, 1052, 1053. But contemplation means a good deal more than simply recognizing a probability. In *Sowell* v. *Champion*, 2 Nev. & P. 627, 634, it was held that an act generally lawful, such as placing a writ for execution in the hands of an officer, was not made unlawful by a full persuasion or even knowledge that the officer was likely to execute it in a place which might and did turn out to be out of his jurisdiction. The officer had an unfettered right of decision, and it was his lookout to see that he kept within the law. See *Kahl* v. *Love*, 8 Vroom, 5; *Savings Bank* v. *Ward*, 100 U. S. 195. So here as to the car. There has been a suggestion in some cases of a more severe rule in the case of very dangerous agencies. *Loop* v. *Litchfield*, 42 N. Y. 351.; *Goodlander Mill Co.* v. *Standard Oil Co.* 63 Fed. Rep. 400. But whether there be any such qualifications or not the present case is not within it. If it had appeared that the use made of the car was contemplated by the defendant, it still would have been a use subject to inspection, and of a car with no secret defect.

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By a Connecticut statute of 1895, c. 176, no action for damages in a case like the present can be maintained unless a notice of the claim, etc. is given to the defendant company within four months. If this be construed as going only to the remedy, no doubt it is local and is not a bar to the present action. But if it applies to the present case and goes to the substantive right, it is a bar. An act done and having its consequences within a civilized jurisdiction and lawful or free from liability there is not actionable elsewhere. *Higgins* v. *Central New England & Western Railroad*, 155 Mass. 176, 179. We say so much because it was argued that the Connecticut statute could not control the action of the court. But in view of what we have said it is unnecessary to consider which is the true view of the statute. It also is unnecessary to consider any question of evidence which was argued. *Exceptions overruled.*

JOHN C. F. SLAYTON *vs.* PHILIP A. BARRY.

Middlesex. January 12, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Liability of Infant for Tort ex contractu.

An infant cannot be held liable in tort for deceit or conversion the proof of which requires the plaintiff to show that a contract, which by the infant's false representations relative to his age he was induced to make and perform, was part and parcel of the fraudulent transaction.

TORT, for deceit and for conversion. Trial in the Superior Court, before *Blodgett*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion, and in a note by the reporter.

J. F. Wiggin, for the plaintiff.

W. F. Kimball, for the defendant.

MORTON, J. The declaration in this case is in two counts. The first count alleges in substance that the defendant intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age and thereby induced the plain-

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tiff to sell and deliver to him the goods described, and though often requested had refused to pay for or return the goods but had delivered them to persons unknown to the plaintiff. The second count is in tort for the conversion of the goods described in the first count. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff,* and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. *Merriam* v. *Cunningham*, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. *Johnson* v. *Pie*, 1 Lev. 169; 1 Sid. 258; 1 Keb. 905. *Grove* v. *Nevill*, 1 Keb. 778. *Jennings* v. *Rundall*, 8 T. R. 335. *Green* v. *Greenbank*, 2 Marsh. 485. *Price* v. *Hewett*, 8 Ex. 146. *Wright* v. *Leonard*, 11 C. B. (N. S.) 258. *De Roo* v. *Foster*, 12 C. B. (N. S.) 272. *Gilson* v. *Spear*, 38 Vt. 311. *Nash* v. *Jewett*, 61 Vt. 501. *Ferguson* v. *Bobo*, 54 Miss. 121. *Brown* v. *Dunham*, 1 Root, 272. *Geer* v. *Hovy*, 1 Root, 179. *Wilt* v. *Welsh*, 6 Watts, 9. *Burns* v. *Hill*, 19 Ga. 22. *Kilgore* v. *Jordan*, 17 Tex. 341. Benjamin, Sales (6th ed.) § 23. Cooley, Torts, (2d ed.) 126. Add. Torts, (Wood's ed.) § 1314. See *contra*, *Fitts* v. *Hall*, 9 N. H. 441; *Eaton* v. *Hill*, 50 N. H. 235; *Hall* v. *Butterfield*, 59 N. H. 354; *Rice* v. *Boyer*, 108 Ind. 472; *Wallace* v. *Morss*, 5 Hill, (N. Y.) 391.

The general rule is, of course, that infants are liable for their

* The plaintiff requested the judge to instruct the jury: 1. That if the defendant, a minor, for the purpose of defrauding the plaintiff and inducing him to sell and deliver goods to the defendant falsely represented that he was of full age, and the plaintiff, relying on such representation, was thereby induced to sell and deliver goods to the defendant, who subsequently repudiated his purchase and refused to pay for the goods for the reason that he was a minor, he is liable in damages. 2. That if the defendant, a minor, purchased goods of the plaintiff, obtained possession of them, converted them to his own use, and subsequently repudiated the purchase and refused to pay for the goods for the reason that he was a minor, the plaintiff at the time of the purchase having no knowledge of the defendant's minority, the effect of the avoidance by the defendant of his contract was to make it void from the beginning, and to render him liable in damages for the conversion of the goods.

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torts. *Sikes* v. *Johnson*, 16 Mass. 389. *Homer* v. *Thwing*, 3 Pick. 492. *Shaw* v. *Coffin*, 58 Maine, 254. *Vasse* v. *Smith*, 6 Cranch, 226. But the rule is not an unlimited one, but is to be applied with due regard to the other equally well settled rule that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts but of protection from their contracts. The true rule seems to us to be as stated in *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely, if the fraud "is directly connected with the contract . . . and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent Com. 241, as follows: "The fraudulent act, to charge him [the infant] must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether as an original proposition it would be better if the rule were as laid down in *Fitts* v. *Hall* and *Hall* v. *Butterfield*, in New Hampshire, and *Rice* v. *Boyer*, *ubi supra*, in Indiana, we need not consider. The plaintiff relies on *Homer* v. *Thwing*, 3 Pick. 492, *Badger* v. *Phinney*, 15 Mass. 359, and *Walker* v. *Davis*, 1 Gray, 506. In *Walker* v. *Davis* there was no completed contract and the title did not pass. The sale of the cow by the defendant operated therefore clearly as a conversion. *Badger* v. *Phinney* was an action of replevin, and it was held that the property had not passed, or if it had that it had revested in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In *Homer* v. *Thwing* the tort was only incidentally connected with the contract of hiring.

We think that the exceptions should be overruled.

So ordered.

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J. LAWRENCE MARTIN *vs.* CITY OF CHELSEA.

Suffolk. January 16, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries occasioned by falling into an Excavation in the Street of a City — Reasonable Care and Diligence.

In this case, which was an action for personal injuries occasioned to the plaintiff by falling into an excavation ten feet in length between the rails of a street railway track where the defendant city was building a tide-water in a sewer, the defendant being engaged in a lawful work, having erected barriers with signs to show that the way was not open to public travel, having had a watchman on the spot night and day, and what happened not reasonably being expected to happen, it cannot be said that there was any want of the "reasonable care and diligence" required by the Pub. Sts. c. 52, § 18.

TORT, for personal injuries occasioned to the plaintiff by falling into an excavation between the rails of a street railway track in the defendant city. Trial in the Superior Court, before *Sherman*, J., who declined to give, among other rulings requested by the defendant, the following: "There is no evidence to warrant the jury in finding that the defendant was negligent, and the verdict must be for the defendant."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

L. L. G. de Rochemont, for the defendant.

O. A. Marden, for the plaintiff.

LATHROP, J. The alleged defect in the highway for which the plaintiff seeks to recover was an excavation ten feet in length, between the rails of a street railway track, on Pearl Street in Chelsea, where the defendant was building a tide-gate in a sewer. The nearest point of the excavation from the corner of Williams Street and Pearl Street was fifty-three feet. The plaintiff, in the daytime, came through Williams Street with the intention of taking a car for East Boston at the corner of that street and Pearl Street. The exceptions state that there was a white post at that corner, and that the next regular stopping place was several hundred feet distant. It is a matter of common knowledge that while street cars stop at white posts to re-

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ceive or to discharge passengers, they do not stop at such posts unless some one is there who wishes to enter the car, or some passenger desires to leave the car.

Just before the plaintiff reached the corner, a car on Pearl Street, bound for East Boston, passed the corner going slowly. The plaintiff made no signal either to the motorman or to the conductor, and the car did not stop. The plaintiff thereupon ran after the car hoping to catch it, and ran between the rails of the track upon which the car was; and, after the car passed over the excavation, he fell into it. He did not see it before falling, as the car hid it from him. He was familiar with the rule of the road as to where the cars should stop.

The exceptions further state that at the time of the accident, the part of the street on the right hand side of the car tracks was so encumbered that it was not in condition for travel, and that it was plain to be seen that it was not; that the sidewalk and that side of the street were encumbered by dirt and stones taken from the excavation, and by other materials; that, at the corner of Pearl Street and Williams Street, on the sidewalk, there was a wooden horse, with a sign "No passing through" on top; a little nearer the trench, and between the sidewalk and the car tracks, another wooden horse, bearing a similar sign, was placed; and beside the trench and on the other side of the tracks, there was a similar horse. There was also a man stationed at the excavation day and night, to guard the same. At the time of the accident his view of the plaintiff was cut off by the approaching car.

The plaintiff testified that when he ran after the car, he did not look to see what obstructions were in the street; that he kept his eyes fixed pretty constantly on the car, which was directly in front of him; and that he was thinking more about getting the car than anything else.

It seems to us very doubtful upon these facts whether the case should not have been taken from the jury, as requested, on the ground that there was no evidence to warrant the jury in finding that the plaintiff was in the exercise of due care. It is, however, unnecessary to decide this point, as we are of opinion that there was no evidence of negligence on the part of the defendant. It was engaged in the performance of a lawful work. It had erected

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barriers with signs to show that the way was not open to public travel. It had a watchman on the spot night and day. What happened could not reasonably be expected to happen; and we see no ground on which it can fairly be said that there was any want of the "reasonable care and diligence" required by the Pub. Sts. c. 52, § 18.

It remains to consider the cases of *White* v. *Boston*, 122 Mass. 491, and *Blessington* v. *Boston*, 153 Mass. 409, relied upon by the plaintiff. In the former case the plaintiff was injured in the night time, while walking upon the sidewalk, by stepping into a trench at the end of the sidewalk. There was no barrier upon the sidewalk, although there was one on the street, which was being repaired. This case was properly held to present a question for the jury.

In *Blessington* v. *Boston*, there was no request that the case be taken from the jury; and the only question before the court was whether a request, which assumed that there had been a momentary negligence on the part of servants for whom the defendant was responsible should have been given.

Exceptions sustained.

MARIA S. DANIELS & others *vs.* COMMONWEALTH AVENUE STREET RAILWAY COMPANY.

Suffolk. January 16, 17, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Jurisdiction. — Revision of Rulings of Railroad Commissioners — Extension of Street Railway Location.

It seems, that a bill in equity under St. 1898, c. 578, § 25, may be maintained to the extent of revising the rulings of the board of railroad commissioners.

An extension of the location of the tracks of a street railway company, approved by the board of railroad commissioners, will not be declared void upon a bill in equity filed under St. 1898, c. 578, §§ 13, 15, for the reason that it is granted over the tracks of another street railway company continuous with the first, the use of which by the defendant is permitted under a contract with the other company, approved by the railroad commissioners, and sanctioned, but not expressly authorized under the Pub. Sts. c. 113, § 48, by the board of aldermen of the city in which the tracks are located; nor for the reason that the location

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granted is temporary only, and is to terminate upon the abolition of a crossing at grade of a railroad and a way over which it is intended that the defendant's track shall subsequently be laid.

BILL IN EQUITY, filed May 13, 1899, under the provisions of St. 1898, c. 578, §§ 13, 15, by Maria S. Daniels and nine others, being a majority in value, as determined by the last preceding assessment for taxation, of the owners of real estate abutting on Paul Street in Newton, seeking to have a location of the defendant's street railway on such street declared void, and to have the defendant enjoined from entering upon such location. The defendant demurred to the bill for want of equity, want of jurisdiction, want of interest by the plaintiffs in the subject matter of the bill, and for other causes. Hearing, before *Morton*, J., who sustained the demurrer and ordered the bill to be dismissed. The plaintiffs appealed to this court. The material facts appear in the opinion.

W. C. Cogswell, for the plaintiffs.

C. A. Hight, for the defendant.

HOLMES, C. J. The plaintiffs constitute a majority in value as determined by the last preceding assessment for taxation of those owning real estate abutting on a public way, Paul Street in Newton, in which a location of the defendant's street railway has been granted. They are also ten in number. Within fifteen days after the granting of the location they filed their written protest with the board of railroad commissioners, as they were authorized to do by St. 1898, c. 578, §§ 13, 15. At the hearing before the railroad commissioners, they asked rulings which raised the questions with which we shall deal, and which would have prevented the approval of the location. The railroad commissioners approved the location, and thereupon the plaintiffs brought this bill, as they say, under the authority of § 25 of the same act. We shall assume for the purposes of decision that, so far as jurisdiction is concerned, the bill may be maintained under § 25, to the extent of revising the rulings of the railroad commissioners, somewhat as a bill in equity may be maintained to revise the action of the insolvency courts, Pub. Sts. c. 157, § 15, and therefore we pass at once to the questions upon which the railroad commissioners are thought to have erred.

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The location granted to the defendant purported to be an extension under § 15. As a fact, there intervened on Central Street, between the end of the old tracks and the beginning of the new, tracks of the Newton and Boston Street Railway Company, which the defendant used under a contract with the latter company. This contract was approved by the railroad commissioners, under St. 1888, c. 278, § 1, but had not been sanctioned by the board of aldermen under Pub. Sts. c. 113, § 48. It is objected that for want of that sanction the defendant was not using the intervening tracks lawfully, and that therefore the new location was not an extension and could not be granted. Assuming for the purposes of decision that the authority of the board of aldermen is necessary to the legality of the contract and has not been given by implication, and assuming also, without deciding, that there must be some sort of continuity with the existing location of the defendant's tracks, we are of opinion that the location does not fail on this ground. The new tracks are connected with the old by a continuous line all actually in use by the defendant. No one who has anything to say about it makes any objection to the use. On the contrary, so far as appears, they all approve of it, — both railroads, the board of aldermen and the railroad commissioners. "The power to authorize a railway 'to extend the location of its tracks,' may be held, without any violence of construction, to include the location of an additional track, not connected with the existing tracks except by the tracks of another railway corporation." *South Boston Railroad* v. *Middlesex Railroad*, 121 Mass. 485, 489. We may add that we do not conceive that the process of the statute was intended to enable citizens, having no other standing than as members of the public, although no doubt having a considerable practical interest, to rip up transactions satisfactory to all who have a voice in the matter by discovering some technical flaw in the records of past proceedings.

The other objection is that the location is expressly made temporary only, to terminate upon the abolition of a grade crossing of Centre Street over the tracks of the Boston and Albany Railroad. The reason for this is that the location through Paul Street is a *détour*, and that as soon as the cars can run straight along Centre Street without crossing the railroad track at grade

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they no doubt will do so. But it is said that there is no power to grant a temporary location. We do not see why not, if the street railway company is satisfied. Ordinarily, it may be presumed, a railway company would not accept a location in those terms. If it is willing to do so, probably some necessity exists, such as notoriously has led to such grants in the case of the Boston Subway, and elsewhere, heretofore. If it is willing to do so, we do not perceive any reason, the statutes being silent, for holding the grant void, or even voidable on the protest of citizens to whom the temporary character of the grant is no injury.

In our opinion the bill discloses nothing of which the plaintiffs are entitled to complain. We have dealt with the requests for rulings so far as they present questions of substantive law in which members of the public have an interest, and so far as they have been argued. If an attempt were made to use §§ 13 and 25 as a means of hampering or delaying proceedings by unmeritorious technicalities, doubtless means would be found to prevent the abuse. *Bill dismissed.*

EDWIN W. GAY *vs.* GEORGE FAIR & another.

Suffolk. January 19, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Patent — Assignment — Corporation — Equity.

In this case, which was a suit in equity by a stockholder in a corporation to compel an inventor to assign to the corporation certain inventions and patents, and to repay to it money voted to him in consideration of a conveyance by him, the evidence warranted a finding that there was no intention to defraud the corporation; but the bill was dismissed without prejudice to the right of any stockholder to claim that the inventions and patents were the property of the corporation.

BILL IN EQUITY, filed October 5, 1899, against George Fair and the Fair Loom Attachment Company, a corporation, alleging the following facts.

The defendant Fair, being the inventor of certain new and useful improvements in loom attachments for which he applied

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for letters patent of the United States on August 27, 1897, entered into an agreement in writing with one T. Henry Pearse, for the purpose of forming a corporation to own and operate the letters patent when granted; and pursuant thereto a corporation under the laws of the State of Maine was organized on October 9, 1897, for the purpose of manufacturing devices containing the invention and described in the application, and selling the same, of which corporation the defendant and three other persons were the incorporators. The defendant Fair was elected director and president of the corporation, which offices he has ever since held. On October 9, 1897, a vote of the stockholders was passed, authorizing the directors "to purchase such patents and interest in patents on the subject of loom attachments as the directors may deem for the best interests of the company, and especially such as are now owned applied for by George Fair, of Boston, Mass., and to pay therefor a sum not exceeding four hundred and ninety-nine thousand, nine hundred and sixty dollars ($499,960) either in cash or in the capital stock of this corporation in not exceeding four hundred and ninety-nine thousand, nine hundred and sixty shares; also to receive suitable deeds and assignments of the property so purchased, and to issue shares of stock in pursuance of this vote." The whole amount of the capital stock of the corporation was five hundred thousand shares of the par value of one dollar each, of which forty shares were sold, or supposed to be sold, for one dollar each.

Pursuant to the above named vote, the board of directors, consisting of the defendant Fair and two other persons, on October 29, 1897, voted "to purchase the patent, patent rights, and processes upon the subject of attachments to looms and shuttles and kindred subjects which now belong to or vested in George Fair, of Boston, or for which he contemplates taking out or applying for patents for the following countries: United States, Canada, England, France, and Germany, and all improvements thereof and therein, and to pay therefor four hundred and ninety-nine thousand, nine hundred and sixty (499,960) shares in the stock of this corporation, the said George Fair executing all suitable assignments and conveyances of the said patent, patent rights, processes, and property, and to issue certificates for such shares in the name of the said George Fair or his nominees."

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In pursuance of such vote, 499,960 shares of stock of the corporation were issued in payment for the inventions, patents, and interests.

At a meeting of the directors of the corporation, the defendant Fair being present and acting as chairman, it was voted to sell the patents, patent rights, and processes for the United States belonging to the corporation upon the subject of attachments to looms and shuttles and kindred subjects, to the American Fair Loom Attachment Company, a corporation duly incorporated under the laws of Maine, and to receive in payment therefor 499,940 shares in the stock of that corporation, such stock to be issued in the name of the Fair Loom Attachment Company, or its nominees; and accordingly the patents, patent rights, and processes were sold for such consideration.

At some time subsequent to the organization of the Fair Loom Attachment Company the defendant invented a certain improvement on the loom attachment for which he had applied for letters patent in August, 1897, and having reported the fact of his invention to the directors of the Fair Loom Attachment Company, who at that time were the defendant, the plaintiff, and one other person, it was voted that "the president be and hereby is authorized to procure United States patent on the actuating attachment to looms in connection with the shuttle attachment, and also to see that the description of said actuating attachment is made part of the specifications in the applications for foreign patents, in which this company is interested; also the papers of assignment from said Fair inventor to be prepared, executed, and forwarded with application for Canadian patent; also that an assignment be made to the American Fair Loom Attachment Company of the right to use, manufacture, and sell in the United States of America the said actuating attachment to looms in connection with the said shuttle attachment." Application for letters patent for this last-mentioned invention was accordingly made by the defendant Fair at the cost of the Fair Loom Attachment Company, by which all the charges and costs thereof were paid, but the applications were not assigned to the corporation by the defendant Fair, and he refuses so to assign them.

The defendant Fair caused an assignment to be made by him to the corporation of the first-named invention, and letters patent,

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and inserted therein an agreement by the corporation to pay him $200 monthly during the life of the patent, a copy whereof "is hereto annexed marked F"; * and thereunder large sums have been paid by the corporation to him, and received by him without any consideration whatever.

On August 19, 1898, at a meeting of the directors, consisting of the plaintiff, the defendant Fair, and one other person, the defendant Fair with the other person, and against the protest of the plaintiff, voted that the patent for the invention first above named, which had been allowed by the United States Patent Office, be issued to the defendant Fair, and held by him until payment of the indebtedness to him had been made by the corporation. The vote recited "that the consideration of two hundred dollars ($200) per month, as named in an assignment of patent given by George Fair to this Company and dated Jan'y 25, 1898, is an obligation of this Company."

At a meeting of the directors of the Fair Loom Attachment Company, consisting of the plaintiff, the defendant Fair, and one other person, held on September 8, 1898, the defendant Fair and

* The material portion of this instrument was as follows: "Now therefore to all whom it may concern, be it known that for and in consideration of one dollar to the said George Fair in hand paid by said Fair Loom Attachment Company, the receipt whereof is hereby acknowledged, by the said George Fair, and in further consideration of an agreement on the part of the said Fair Loom Attachment Company, to be well and truly kept and perfofmed, to pay to the said George Fair, his heirs and assigns, the sum of two hundred dollars per month, on the twelfth day of each and every month, beginning October 12, 1897, during the lifetime of any United States patent which may be granted for the said improvements; and upon the still further consideration that the said company shall, at the most advantageous time, having respect to the validity and lifetime of the patents, procure in said company's own name, and at its own expense, patents in Canada, England, France, and Germany, as well as the United States, the said George Fair has assigned, sold, and set over, and does by these presents assign, sell, and set over unto the said Fair Loom Attachment Company, its successors and assigns, all the right, title, and interest which he has or may have in said invention and patents, and all improvements and amendments thereof, hereby covenanting and agreeing with the aforesaid company that he has the full right to convey the interest herein transferred, and that he has not executed any writings in conflict herewith. And he hereby authorizes and requests the Commissioner of Patents of the United States and the Commissioner of Patents of Canada to issue the said letters patent to the said Fair Loom Attachment Company in accordance with this assignment."

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the other person voted that the first-named invention be reassigned to the defendant Fair, and he caused the letters patent to be sent to him, and he now holds them.

The defendant Fair, subsequently to October 29, 1897, made a certain invention other than that above referred to, which is an improvement in the invention first above described, for which he has applied for letters patent, and which he is bound to assign to the Fair Loom Attachment Company, together with his application for a patent therefor, but which he refuses to do.

The plaintiff is a stockholder in both the Fair Loom Attachment Company and the American Fair Loom Attachment Company, and has paid for his stock a large sum of money, relying entirely upon the supposed value of the inventions which had been conveyed to the corporation, and he still believes that the inventions are of great value, and without them both the corporations are unable to do the business for which they were organized, and his stock therein is worthless.

The plaintiff has requested the defendant Fair, as president of the Fair Loom Attachment Company, and the clerk of the corporation, in writing, to call a meeting of the stockholders of the corporation for the purpose of taking proper action as to the matters and things above set forth, and particularly to begin suit against the defendant Fair in order to protect the interests of the corporation and its stockholders; but no meeting of the stockholders has been called for such purpose.

The prayer of the bill was that the defendant Fair be required to disclose whether he had caused an assignment, or what purports to be such, to be made from the Fair Loom Attachment Company to him of the letters patent; that if he had caused such an assignment to be made to him he be ordered to reconvey the same to the corporation; that he be ordered to execute and deliver to the corporation an assignment of the second invention and the application for letters patent therefor filed January 25, 1898; that if there had been no conveyance made by the corporation to him of the letters patent first named he be restrained from asserting any claim to the patent under the vote of the directors of August 19, 1898, or September 8, 1898; that he be ordered to deliver such letters patent to the clerk of the corporation; that he be ordered to assign to the corporation patents

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granted to him for the inventions in Canada, Great Britain, France, and Germany, and also the second invention referred to in the bill and the application for a patent therefor; and that he be ordered to release the corporation from all liability to pay him the sum of $200 a month or anything else under the assignment by him to the corporation, and to return to the treasurer of the corporation all sums received by him under such assignment.

At the hearing, before *Hammond*, J., the following decree was entered.

"This cause came on to be heard, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

"First. That the terms and agreements severally set forth in the instrument of assignment dated the 25th day of January, A. D. 1898, a copy whereof marked F is annexed to the plaintiff's bill of complaint, are severally binding upon the defendant Fair Loom Attachment Company and the defendant George Fair, and, so far as inconsistent with the other instruments or agreements named in the bill of complaint or annexed thereto, are a substitute therefor.

"Second. And it appearing that the defendant George Fair has not been unwilling, upon his part, to do whatever was required of him by virtue of said instrument of assignment whenever called upon so to do by the Fair Loom Attachment Company, there was no necessity for the plaintiff to bring his bill of complaint against the defendants; wherefore this court doth order that the plaintiff's bill do stand dismissed out of this court, with costs to be paid by the plaintiff Edwin W. Gay to the said defendant George Fair and the defendant Fair Loom Attachment Company, to be taxed by the clerk of the court."

The plaintiff appealed to the full court.

The facts appearing in evidence and material to the decision are stated in the opinion.

C. H. Drew, for the plaintiff.

G. Fair, *pro se*.

G. M. Rich, for the Fair Loom Attachment Company.

BARKER, J. The evidence was taken under Equity Rule 35, and the case comes here by an appeal from a decree dismissing the bill. There is no dispute that the plaintiff is

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a stockholder, nor that he has brought the matters with which the bill is concerned to the attention of the officers in control of the corporation, who own or control a majority of its stock, nor that the corporation has neglected, if it has not refused, to take action upon the alleged matters of complaint. The chief of those is that while by the votes of the stockholders and of the directors the sale from the inventor to the corporation was for certain shares of the stock, no other consideration being named in the votes, the conveyance recited as a further consideration an agreement of the corporation to pay the inventor two hundred dollars a month. Although the stock stipulated in the votes has been transferred, the inventor has also received some such monthly payments, and the corporation, and its officers, and a majority of its directors at least, take the ground that the inventor, who is also the president and one of the three directors, was entitled to the monthly payments. Growing out of this was a reassignment to the inventor of the patent issued by the United States, to be held by him until the indebtedness because of the omission to make the monthly payments should be made good.

The evidence leads us to the inference that, notwithstanding the language of the votes, the monthly payments and the transfer of stock were both terms of the bargain with the inventor, and that the clause to that effect in the conveyance was assented to by the plaintiff while he was himself a director; and that he also assented by his affirmative vote to the action of the directors on August 19, 1898, in declaring the stipulation for the monthly payment to be an obligation of the corporation.

It seems that the plaintiff, at the same meeting, opposed and protested against the vote that the principal patent, not then issued, should be issued to the inventor, and held by him until the payments in arrears should be made up. The conveyance contained no term requiring a reassignment in case of non-payment. But it seems that the corporation had no other means of securing its indebtedness. As the invention had been assigned to the corporation, the United States patent issued to it notwithstanding this vote and was then reassigned. Assuming that it would have been better not to make this reassignment it may have been made and received in good faith, merely as security for the overdue instalments and for the future discharge of the

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obligation. After the bill was filed this patent was again assigned to the corporation, and it now stands in its name. In connection with this reconveyance the claim to further payment of the monthly sum was given up, for what consideration does not clearly appear. But it is not a necessary inference that the assignment as collateral, or the retransfer, was unfair.

The Canadian patent was issued to and stood in the name of the corporation. The English and German patents have not been issued. The French patent has been issued to the inventor and has not yet been assigned to the corporation; nor had the reassignment of the United States patent to the corporation been recorded in Washington at the time of the hearing. The inventor testified that at all times he had been ready, and was ready still to execute any proper assignments, or other instruments, to vest in the corporation all the inventions and patents contemplated by the agreement between himself and the corporation. From this and the other evidence it would be proper to infer that there had been no design on the part of the corporation, or of any of its officers, to betray or sacrifice its interests in any of the matters of which the plaintiff complains.

The invention made after October 29, 1897, does not seem to have been one to which the corporation had a right. We are of opinion that the bill should be dismissed. As the corporation had not, at the time of the appeal, caused the retransfer to itself of the American patent to be recorded, and had not then taken to itself a transfer of the French patent, and as the English and the German patents, if granted, will issue in the name of the inventor, although in fact the property of the corporation, this suit ought not to bar any stockholder from claiming that all the inventions covered by the agreement, and the patents therefor in the United States, the Dominion of Canada, England, France, and Germany, are the property of the corporation. We assume that it was for this purpose that the recitals were inserted in the decree, and it is just to dismiss the bill without prejudice to the right of any stockholder to claim that the inventions and patents mentioned in the bill, except the invention alleged to have been made after October 29, 1897, and the patents therefor, are the property of the corporation.

So ordered.

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GEORGE H. JOHNSON *vs.* NORWALK FIRE INSURANCE COMPANY.

Suffolk. January 23, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Insurance — Law and Fact — Vacancy of Premises — Evidence.

In this case, which was an action on a policy of insurance containing a provision that it should be void, if, without the assent of the insurance company, "the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent," the judge was justified, on the evidence, in refusing to rule, as matter of law, that the plaintiff was not entitled to recover and in submitting the question to the jury.

CONTRACT, upon a policy of insurance against loss by fire, upon a building used as a grocery store and upon stock and fixtures therein owned by the plaintiff, in Natick. The evidence showed a total loss on October 15, 1897, and was within the time covered by the policy. At the trial in the Superior Court, before *Sherman*, J., the plaintiff testified that he had lived in Natick for some years, but was obliged to move his wife from that place because of her health to Fitchburg, on June 8, 1897, but returned to Natick on the following day; that he went back to Fitchburg on June 11, having locked the store at Natick and having left no one in charge; that in a week he returned and went to the store, collected bills, and slept there for a couple of nights; that he shut the store again and went to Fitchburg, where he remained about a week; that he again returned to Natick and remained at the store two or three days; that he thus continued to divide his time between Fitchburg and Natick up to the time of the fire, October 15, 1897, at which time he was at Fitchburg; that when at Fitchburg he left no one in charge of the store; that he was at the store nearly every week from June 10 to October 13, and usually stayed two or three days before returning to Fitchburg; that from June 8, 1897, to the time of the fire, he did some grocery business, selling perhaps five dollars' worth of tobacco; that his books were burned

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at the time of the fire and that at no time was he away from the store for thirty days.

There was also other testimony tending to show that the store had been open, and that the plaintiff was there within ten days of the time of the fire.

The plaintiff had never had the assent of the defendant, in writing or in print, that the premises might become vacant by the removal of the occupant and so remain vacant for more than thirty days.

The defendant requested the judge to rule that according to the terms of the policy, relating to vacancy, the plaintiff was not entitled to recover. The judge refused so to rule as matter of law, and submitted the question to the jury with appropriate instructions.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. G. Sleeper, for the defendant.

J. J. Scott & W. B. Sprout, for the plaintiff.

LATHROP, J. The policy in this case declares that it shall be void, if, without the assent of the insurance company, "the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent." The only question presented is whether on the evidence stated in the bill of exceptions the judge should have ruled, as matter of law, that, according to the terms of the policy, the plaintiff was not entitled to recover. We are of opinion that the judge was right in refusing this ruling, and in submitting the question to the jury.

Most of the cases relied upon by the defendant contained clauses very different from the one at bar. In *Harrison* v. *City Ins. Co.* 9 Allen, 231, the policy by its terms became void "when the occupant personally vacates the premises, unless immediate notice be given to this company, and additional premium paid." No question was made as to the fact that the premises were vacated, and the only question was as to whether notice of the fact had been given to an agent authorized to receive notice. In *Keith* v. *Quincy Ins. Co.* 10 Allen, 228, the clause was: "If the building insured remains unoccupied over thirty days without notice, this policy shall be void." The

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building insured was a trip-hammer shop. The jury returned a verdict for the defendant, and the question before the court was upon the correctness of the ruling of the judge as to the meaning of the word "occupancy." In *Ashworth* v. *Builders' Ins. Co.* 112 Mass. 422, the policy contained the following provisions: "If the buildings insured shall be vacated, and remain so more than thirty days without the consent of this company, . . . this policy shall be void." "Buildings unoccupied are not covered by this policy, unless insured as such." At the time of the taking out of the policy, and at the time of the loss, the property insured, namely a house and barn, were occupied only as follows: When the plaintiff was engaged in carrying on the farm contiguous to the buildings, he and his servants took their meals in the house, and the barn was used for the usual purposes of a farm barn for storing hay and farming tools, but cattle were not kept in it. The only discussion in the opinion is as to the meaning of the word "unoccupied," and it was held that these buildings were unoccupied. We find nothing in *Newmarket Savings Bank* v. *Royal Ins. Co.* 150 Mass. 374, which bears upon the question before us.

In the case at bar there is nothing said about occupancy, and no question arises as to whether the house was occupied or unoccupied. That which is provided for is the house becoming vacant by the removal of the owner or occupant. The words mean something more than a temporary absence for business or pleasure, and, as is said in *Cummins* v. *Agricultural Ins. Co.* 67 N. Y. 260, 263, "they refer to a permanent removal and entire abandonment of the house." See also *Chandler* v. *Commerce Ins. Co.* 88 Penn. St. 223; *Franklin Ins. Co.* v. *Kepler*, 95 Penn. St. 492.

On the evidence the jury would have been warranted in finding that there was no permanent removal of the plaintiff, and that his visits to Fitchburg were for the purpose of visiting his sick wife, and were temporary in their character. It does not appear that he intended to give up business in Natick when he left with his wife on June 8, 1897, and we are not called upon to pass upon the question whether, if he so intended, his subsequent visits to the store could prolong the policy after thirty days from the time he first left. *Exceptions overruled.*

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BROWNVILLE MAINE SLATE COMPANY *vs.* CHARLES F. HILL & another.

Suffolk. January 23, 1900. — March 3, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Contract — Declaration — Conditional Delivery — Order — Finding of Jury — Evidence — Statute of Frauds — Waiver.

In this case, which was an action of contract, the declaration alleging that the merchandise was delivered to the defendant and by him carried away, with the agreement between him and the plaintiff that the property therein should remain in the plaintiff until the plaintiff had been furnished an order for the amount of the contract price drawn by W. (with whom the defendant had contracted to do a part of the work, W. to furnish the materials therefor) and accepted by the defendant, it was competent for the jury to find that the delivery of the merchandise was a conditional delivery; that the condition had not been waived; that the title in the merchandise had not passed to W., and that as the defendant used the merchandise as his own, he was liable to the plaintiff; and taking evidence that S., the agent of the plaintiff, had conversations with the defendant, in which the defendant promised to pay for the merchandise, in connection with a letter of the plaintiff to the defendant stating that S. advised him that the defendant was the original contractor and that he would see that the plaintiff was paid, and that it would not be necessary to have an order from W., it was a question for the jury whether the promise of the defendant was to pay the debt as a debt of his own, or to pay the debt of W.; and if the jury found from all the evidence that there was a waiver of the condition of an accepted order based on the defendant assuming the debt as his own, they might well find from the conduct of the defendant in using the merchandise that he agreed to pay for it, although he did not answer the letter.

CONTRACT, to recover the price of 155 squares of slate. The declaration contained two counts: the first on an account annexed, for goods sold and delivered by the plaintiff to the defendants, and the second, a special count, as follows:

"The plaintiff says that on or about June 7, 1897, one G. J. Williams ordered of the plaintiff one hundred and fifty-five (155) squares of 16 x 12 No. 1 Brownville slate, not drilled, for roofing a church at Beverly in Massachusetts, at the price of five dollars and eighty-two cents ($5.82) per square, amounting in all to nine hundred and two dollars and ten cents ($902.10), the said slate to be shipped from the plaintiff's works in Maine to the defendants at Beverly. The plaintiff, on or about July 3, 1897,

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caused fifty (50) squares of the said slate to be shipped to the defendants at Beverly, and on or about July 6, 1897, caused one hundred and five (105) squares to be shipped to the defendants at Beverly. The said slate were thereupon delivered to the defendants and by them carried away with the understanding and agreement between them and the plaintiff that the property in the said slate should remain in the plaintiff until the plaintiff had been furnished an order for the amount of the contract price of the slate drawn by said Williams upon the defendants and accepted by them. Thereafter the said slate being at Beverly and in the possession of the defendants, they represented to the plaintiff that they desired to use the said slate, and thereupon on or about September 18, 1897, it was agreed between the plaintiff and the defendants that the defendants might acquire title and use the said slate without an accepted order upon them as above set forth, provided that the defendants would promise to pay the contract price thereof; and the defendants did thereupon, in consideration of the agreement of the plaintiff and the acquirement of title and use of said slate, promise the plaintiff that they would pay the said contract price. The said promises and agreements being mutually made by the plaintiff and the defendants, the defendants thereupon acquired the title of and used the slate for the purpose of roofing a church at Beverly.

"And the plaintiff further says that the defendants, by virtue of their said promise, became liable for the contract price of the said slate; but although often requested, they have neglected and refused to pay the same, and they now owe the plaintiff the sum of nine hundred and two dollars and ten cents ($902.10), together with interest thereon."

Trial in the Superior Court, before *Richardson*, J., who refused to rule that the evidence did not support the declaration, and that upon the whole evidence the plaintiff was not entitled to recover; and the defendants excepted.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions. The facts appear in the opinion.

G. L. Mayberry, (*J. T. Hughes* with him,) for the defendants.

E. I. Smith, (*C. M. Ludden* with him,) for the plaintiff.

LATHROP, J. The only question presented in this case is whether the judge should have given the ruling requested by

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the defendants that the evidence did not support the plaintiff's declaration; and that upon the whole evidence the plaintiff was not entitled to recover.

We are of opinion that this ruling could not properly have been given, and that the case was rightly submitted to the jury. There was evidence from which the jury might have found the following facts. The plaintiff had its office in Worcester, in this State, and its quarry in Brownville, Maine, and an agent in Boston, one Spiers. The defendants had made a contract to do certain work on a church in Beverly, including the roofing. They made a contract with one Williams to slate the roof for the sum of $2,900, he to furnish the materials and do the work. Williams tried to get the slate from the plaintiff; and after some negotiations, his order was accepted on condition that he should give an order on the defendants for the price, and procure the same to be accepted by them. This order was to be procured before the slate was shipped. Subsequently, in July, on the promise of Williams to procure the acceptance of the order, the slate was sent to the defendants at Beverly. The shipping receipt stated that the slate was consigned to "Hill & McGinty, Beverly, Mass.," and also stated that it was not negotiable, and that the West End Roofing Company was to be notified. The West End Roofing Company was the name under which Williams did business. The invoices of the goods ran to the West End Roofing Company, and these together with the shipping receipts were sent to the plaintiff's agent in Boston.

The slate arrived in Beverly about the middle of July, and remained on the cars some weeks, when the first named defendant paid the freight on the slate, and caused it to be taken to the church, and there it remained until the latter part of September, when Williams began to lay the slate under his contract, and laid about two thirds of it by the end of October, when he was unable to proceed. The defendants then finished the work with the rest of the slate. After the arrival of the slate at Beverly, Spiers called upon Williams several times during July and August to obtain the acceptance of the order, but was put off.

After failing to get the order from Williams, Spiers called at the office of the defendants in August, and saw the defendant Hill, who in answer to the question why the plaintiff could not

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have an order accepted by them, said that the time had not come for any payments on the church, and that the bill would be paid as soon as payments were made on the job. This conversation was reported to the office of the plaintiff in Worcester. On September 2, the treasurer of the plaintiff wrote to the defendants referring to the shipment of the slate, and stating that the agreement was "that upon the arrival of the slate, the West End Roofing Co. would give us an order on you for an amount to cover our invoice." The letter concluded with these words: "We think it best to advise you that the slate are our property until Mr. Williams gives us an accepted order on you for our invoice." To this letter the defendants replied on September 10: "Yours of the 2d inst. was duly received; but we have deferred answering until now, thinking that we might have something definite to say in regard to the matter of slate sent to Beverly. The work on the church there has not progressed as fast as was expected; they are only just now ready to commence laying slate, and we doubt if a payment can be had on account of the roof work much before thirty days from now." To this letter the plaintiff replied on September 18, as follows: "Your favor of the 10th inst. was duly received, and our representative in Boston, Mr. W. A. Spiers, advises us that you are the original contractors and that you will see that we are paid. Under such circumstances it will not be necessary to have an order from the West End Roofing Company on you, and we have so advised Mr. Spiers." To this letter the defendants made no reply.

If we lay on one side this letter, for the moment, it was competent for the jury to find that the delivery of the slate was a conditional delivery; that the condition had not been waived; that the title in the slate had not passed to Williams; and that, as the defendants used the slate as their own, they were liable to the plaintiff in this form of action. *Whitwell* v. *Vincent*, 4 Pick. 449. *Whitney* v. *Eaton*, 15 Gray, 225. *Farlow* v. *Ellis*, 15 Gray, 229. *Hirschorn* v. *Canney*, 98 Mass. 149. *Adams* v. *O'Connor*, 100 Mass. 515. *Nelson* v. *Dodge*, 116 Mass. 367. *Armour* v. *Pecker*, 123 Mass. 143. *Salomon* v. *Hathaway*, 126 Mass. 482.

As to the letter of September 18, it appeared in evidence that Spiers had several conversations with the defendant Hill, in

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which Hill promised to pay for the slate. Taking this evidence in connection with the letter, it was a question for the jury whether the promise of the defendants was to pay the debt as a debt of their own, or to pay the debt of Williams. *Heywood* v. *Stiles*, 124 Mass. 275. *Barrett* v. *McHugh*, 128 Mass. 165. If the jury found from all the evidence that there was a waiver of the condition of an accepted order based on the defendants assuming the debt as their own, they might well find from the conduct of the defendants in using the slate that they agreed to pay for the slate, although they did not answer the letter.

Exceptions overruled.

FRANK SCRIBNER *vs.* FLAGG MANUFACTURING COMPANY.

Suffolk. January 15, 1900. — March 5, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Authority of President of Corporation to make Contract — Statute of Frauds.

At the trial of an action of contract to recover certain commissions under an alleged oral agreement with the president of the defendant corporation, it appeared that the president was authorized to make a certain written agreement with the plaintiff, and that payments were made under it by the corporation, the agreement containing the clause, "Any transaction entered into in other countries shall be subject to another agreement;" that the oral agreement declared on relative to sales in other countries followed the next year, the president being still the ostensible agent of the defendant, and that the plaintiff was entitled to a commission on a certain sum representing sales in those countries, if he could recover anything The president did not deny making the oral agreement, but testified that he did not remember any such conversation. *Held*, that enough appeared to warrant a finding that the president was authorized to make the contract declared on.

An oral agreement which will be completely performed according to its terms and intention if either party should die within the year, is not within the statute of frauds.

CONTRACT, to recover certain commissions under an alleged oral contract. Trial without a jury, before *Barker*, J., who found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. E. Maynadier & G. L. Huntress, (*W. Maynadier* with them,) for the defendant.

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N. E. Warren, (of New York,) (*M. O. Adams* with him,) for the plaintiff.

LATHROP, J. No question was made as to the authority of G. H. P. Flagg to sign in behalf of the defendant corporation, as president, the written agreement dated January 2, 1896. By this agreement, the plaintiff was to represent the defendant in New York City, in the sale of a musical instrument called the Apollo harp, and was to receive certain compensation therefor. In July, 1897, the defendant began to put upon the market an instrument called the Regent zither, and this instrument was sent to the plaintiff in New York.

In July, 1897, the plaintiff became acquainted with one Eichler, a dealer in books, who gave away musical instruments as presents to his customers, and who wished to go into the business of selling musical instruments in Germany and elsewhere in Europe. The plaintiff began negotiations with Eichler for the marketing of the Regent zither and harps in Germany and other foreign countries. There was some correspondence between the plaintiff and the president of the defendant corporation in regard to this, but nothing was said as to the compensation to be paid to the plaintiff.

The plaintiff testified that on August 26, 1897, he came to Boston and saw Flagg, and told him that he, the plaintiff, had a chance to make a big deal with Eichler, to sell the defendant's goods in Germany and other foreign countries; that Flagg was very much pleased; that after some negotiations, Flagg agreed to give the plaintiff five per cent on all sales made to Eichler; that the plaintiff went to New York and returned to Boston the next day with Eichler, and Eichler ordered some goods of the defendant. Flagg testified for the plaintiff, but said nothing as to his authority to bind the defendant. Nor did he deny making the oral agreement with the plaintiff, but on this point merely testified that he did not remember any such conversation. It was admitted that if the plaintiff was entitled to recover at all, he was entitled to recover a commission upon $170,000, that being the amount of the sales made in Germany and other foreign countries up to the date of the bringing of the action. The judge who tried the case without a jury found for the plaintiff in the sum of $8,500, and interest; and the case comes

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before us on the defendant's exceptions to the refusal of the judge to give two rulings. First, that the plaintiff had not made out a *prima facie* case, and, secondly, that the case came within the statute of frauds.

It is contended, in support of the first ruling requested, that it does not appear that Flagg, as president of the corporation, had authority to bind it. This point was not specifically raised at the trial, nor does it appear to have been called to the attention of the presiding justice in any way. We assume, however, for the purposes of the case, that the question is open under the ruling requested.

We have, however, no doubt that enough appeared in this case to warrant the presiding justice in finding that the president was authorized to make the contract declared on. Corporations must act by agents, and it is a matter of little importance by what name an agent is called. There is no dispute in this case that the president of the defendant corporation was authorized to make the written agreement of January 22, 1896, and that payments were made under it by the corporation. This agreement contained the clause, "Any transaction entered into in other countries shall be subject to another agreement." It was clearly contemplated then that another agreement might be made, and the agreement declared on followed the next year. Flagg was still the ostensible agent of the defendant. It was admitted that the sales made by the defendant to Eichler amounted to $170,000 and that the plaintiff was entitled to a commission on this sum, if he could recover anything. We have then abundant proof of the recognition by the defendant of the authority of its president to make contracts, and if he had authority to make these contracts, there can be no doubt, in the absence of evidence to the contrary, that a *prima facie* case was made out. *McNeil* v. *Boston Chamber of Commerce*, 154 Mass. 277, and cases cited on p. 286. See also *Oakes* v. *Cattaraugus Water Co.* 143 N. Y. 430; *Tyler* v. *Anglo-American Savings & Loan Association*, 30 App. Div. (N. Y.) 404.

The remaining question relates to the statute of frauds, Pub. Sts. c. 78, § 1, cl. 5. The defendant contends that the contract was not to be performed within one year, and therefore, not being in writing, and signed by the party to be charged, is

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within the statute. There is nothing in the terms of the agreement to show that it was not to be performed within one year. The plaintiff was to receive five per cent on all sales made to Eichler. The contract between Eichler and the defendant, so far as appears, was purely a personal one, and would have terminated by the death of Eichler. This might have happened within a year, and consequently the contract was not within the statute. *Peters* v. *Westborough*, 19 Pick. 364. *Lyon* v. *King*, 11 Met. 411. *Doyle* v. *Dixon*, 97 Mass. 208. *Somerby* v. *Buntin*, 118 Mass. 279, 286. *Bartlett* v. *Mystic River Corporation*, 151 Mass. 433. *Carnig* v. *Carr*, 167 Mass. 544. *McGregor* v. *McGregor*, 21 Q. B. D. 424. *Exceptions overruled.*

HENRY C. BLISS & another, receivers, *vs.* ROBERT W. PARKS & others.

SAME *vs.* F. E. LITCHFIELD & others.

SAME *vs.* JOHN R. REED & others.

Hampden. December 12, 1899. — March 6, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Equity — Multifariousness — Allegation that Officers of Corporation mismanaged it for Personal Gain, Ground for Equitable Relief — Argumentative Allegations — Discovery.

The objection that a bill in equity is multifarious is one upon which there is no inflexible rule, and the question whether the objection shall be sustained must be determined largely by the circumstances of the particular case; and in this case all the matters charged are so related to the general ground of complaint that the objection cannot be sustained.

The general ground of complaint in a bill in equity by the receivers of a corporation that the defendants, as officers in charge of the business of the corporation, mismanaged it for their personal gain, is a ground for equitable relief.

While there are in this bill in equity, by the receivers of a corporation, some matters which are pleaded argumentatively and are not plainly and directly charged, as, for instance, some statements that officers of the association, and the defendants "conspiring to defraud," or "conspiring to appropriate unlawfully," or "further conspiring to defraud," did certain acts, in the main the allegations are plain and direct, and are not open to the objection that they are argu-

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mentatively stated; and this ground of demurrer being addressed to the bill as a whole is unsound and must be overruled.

A demurrer to a bill in equity on the ground that it seeks discovery of matters within the knowledge of the plaintiff must be overruled, if it does not appear from the bill that the matters concerning which discovery is sought are within the knowledge of the plaintiff.

THREE BILLS IN EQUITY, by the receivers against the officers and agents of the Bay State Beneficiary Association. The prayers were for discovery, for an accounting, for the payment to the receivers of all moneys in excess of reasonable compensation and expenses, for answering for damages sustained by the corporation, and for general relief. The defendants demurred to the bills, assigning various grounds therefor stated in the opinion. Hearing before *Knowlton*, J., who reserved the cases on the bills and demurrers for the consideration of the full court. The facts appear in the opinion.

H. C. Bliss, pro se.

J. R. Dunbar, (*A. F. Lilley* with him,) for Parks.

A. Hemenway, (*W. S. Pinkham* with him,) for the defendants in the second case.

A. S. Kneil, for Reed, submitted the case on a brief.

BARKER, J. These are bills in equity inserted in writs of attachment sued out of this court on August 4, 1898.

The plaintiffs are receivers of the Bay State Beneficiary Association, appointed by a decree of this court entered on November 19, 1897, in proceedings brought by the Attorney General at the relation of the insurance commissioner. The power to prosecute in their own names suits to convert into cash the property and effects of the association which are in action, is given to them by the decree appointing the receivers. *Wilson* v. *Welch*, 157 Mass. 77, 80.

The association was incorporated under the laws of Massachusetts on June 2, 1881, for the purpose "of rendering pecuniary aid to the families of deceased members or to their heirs or assigns." From the time of its incorporation until proceedings were instituted against it by the Attorney General, the association transacted a benefit assessment insurance business, issuing benefit certificates, and receiving from certificate holders money for admission fees, annual dues, and mortuary assessments.

Annexed to the bills are copies of the certificate of incorpora-

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tion, of the original by-laws of June 2, 1881, and of the by-laws as amended on January 13, 1892.

Speaking generally, the contention of the receivers is that the defendants were officers and agents of the association entrusted with its property and managing its business; and that in the discharge of this trust, they have applied the money of the association to their own private use.

In a sense the bills are alike, each recounting in the same language the course of the association, from the time of its incorporation, and alleging in the same terms a series of acts of officers and agents covering that period. The chief difference between the bills is that the first alleges that the defendants in the first suit were charged with the management, during the period from June 2, 1881, to January 20, 1893, while the second alleges that the defendants in that suit were charged with the management from January 20, 1893, to September 12, 1896, and the third charges that the defendants in the third suit had the management from September 12, 1896, to the time of the receivership in November, 1898.

There are four defendants in the first suit, each of whom was a person named in the certificate of incorporation as one of the persons who had associated themselves to form the corporation, and each of these defendants has filed a separate answer containing a demurrer.

In the second suit there are ten defendants, one of whom is a defendant in the first suit. Five of these defendants have filed separate answers, each containing a demurrer.

In the third suit there are six defendants, two of whom are defendants in the first suit, and one of those is also a defendant in the second suit. Four of these six defendants have filed separate answers, each containing a demurrer.

Each of these thirteen demurrers asserts that the bill to which it is directed is multifarious, and that it has no equity, and some of the demurrers also assert that the bill is argumentative, and also that it seeks a discovery of matters which are within the plaintiffs' own knowledge.

Each suit is reserved for the determination of the full court upon the amended bill in that case and the demurrers thereto.

1. All the demurrers take the ground that the bills are

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multifarious, and "brought for distinct matters and causes, which do not affect all the defendants alike, and which are not so related to each other as to be properly joined in the same petition or bill of complaint."

Each bill alleges that during a certain period the defendants named in that bill, as officers and agents of the association, were charged as trustees with the management of its business and the custody of its funds, and that in the performance of their trust they have not acted in good faith, but have conducted the business for their own personal benefit or gain, and have not kept safely and accounted for the money and property of the corporation, but have diverted them to their own use. In the light of this statement, which is the general ground of relief alleged, the different matters charged in each bill are not distinct, but are logically related to each other and to the cause of complaint. Each of them is relevant either as proper matter of inducement, tending to give character to other acts charged, or as being breaches of trust committed, during the period charged, by the defendants in that bill, or as competent upon the question of the kind and amount of relief to be awarded against the defendants named in the suit for the breaches of trust committed by them during the period charged in the bill. The defendants in each suit stood together, during the period specified in the bill in that suit, as the persons who then had the management of the business and the custody of the property of the association. It is not oppressive to make them co-defendants in a suit for equitable relief for breaches of this trust committed during their period of control. If there had been but one suit, covering the whole time from the beginning to the end of the business, and all of the defendants in the three suits had been joined in such a single action, some of them might have claimed with more show of reason that the bill embraced matters for which no relief could be given as against them, and with which they had no such connection as to make it just that they should be kept in court while those matters were determined as against other defendants. Upon that question we express no opinion. The plaintiffs have joined as co-defendants, only those whom they allege to have been at the same time charged with the management and to have misused it together.

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The objection that a bill is multifarious is one upon which there is no inflexible rule, and the question whether the objection shall be sustained, must be determined largely by the circumstances of the particular case. See *Robinson* v. *Guild*, 12 Met. 323, 328; *White* v. *Curtis*, 2 Gray, 467, 471; *Shields* v. *Thomas*, 18 How. 253. 1 Encyc. of Pl. & Pr. 195 *et seq.*

In the present cases, the plaintiffs seek to enforce a general right, with which the matters charged are connected, and to which the parties are so related that they cannot be said to be unduly burdened by being required to defend. There is no contention that the case is so complicated as to prevent the court from undertaking in it to administer justice between the parties.

2. The next ground, taken by all the demurrers, is for want of equity. This ground is stated generally, and must be overruled, if the bill to which it is addressed states any facts calling for equitable relief. *Dimmock* v. *Bixby*, 20 Pick. 368. The fact that each bill charges the defendants in the suit with the wrongful and fraudulent appropriation to their own use, in the administration of their trust as officers and agents of the association, of its property is enough to require the overruling of this ground of demurrer. *Parker* v. *Nickerson*, 112 Mass. 195; 137 Mass. 487. But it will, perhaps, be useful to go farther and to discuss the chief contention made in the argument of the demurrers by the defendants.

The fundamental dispute between the defendants and the plaintiffs is as to the status of the former with reference to the association. The contention of the defendants is that as original incorporators, and as the only associates and successors of those incorporators under the provisions of the amended by-laws, they alone are entitled to all the rights and property of the corporation; and that the certificate holders, or "benefit members," have no other interest in the association or its property than as holders of contracts of insurance. That even if those contracts have been broken by the defendants as officers of the association, the individual certificate holders alone can complain. In fine, that the plaintiffs as receivers have no standing, either to recover from the defendants money which, if as to the corporation it was improperly taken by them as officers, yet belonged to

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themselves absolutely, or to recover from them money which if improperly taken or retained by them, would, if properly disposed of, have enured only to the individual benefit of those insured.

In support of this contention the defendants argue that the statutes under which the association was incorporated allowed the formation of companies which should prosecute a benevolent or charitable undertaking as a business, for the private and peculiar gain and profit of some particular class of members; and that they stand in such a relation to this association; and that they have a right to take and keep as their own property all property of the corporation not needed to fulfil its insurance contracts.

It is true that the statutes under which the association was incorporated contain provisions which contemplate that some corporations formed under them may engage in business, may have a capital stock divided into shares, and may divide profits among members. See St. 1857, c. 56, § 5; Gen. Sts. c. 32, § 5; St. 1874, c. 375.

Assuming, without so deciding, that the statutes would have authorized the seven men who procured the charter of the association to have procured themselves to be so incorporated that the association could transact the business of beneficiary assessment insurance for the sole profit of a distinct class of members, of which only the original incorporators and those persons whom they should choose to admit to that class should be members, and that such members should be alone entitled to control the corporation, and alone entitled to share in its assets after the fulfilment of its contracts, and alone have the power to choose officers and alter or amend by-laws, we are of the opinion that the defendants were never in any such relation to this association.

Nothing of the kind is said in the certificate of incorporation, or in the original by-laws. The only members who are spoken of, or provided for, in those by-laws, which with the certificate of incorporation are the constitution of the association, are certificate holders. There is no reservation to the incorporators of any right in, or control over, the corporation, and no article or provision which reserves to the incorporators as such, or as members of the corporation, any rights to control its business, or to

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take its profits, or to continue to exist as a distinct part of the corporation, with rights in it or in its assets different from or greater than those of the other members. If the incorporators might have made by-laws securing to themselves as incorporators, or as a distinct class or body of members, the profits of the corporation, or the control of its business, they did not do so by the by-laws. It is true that the first board of officers was composed exclusively of men who were the original incorporators, and that directors and officers by the by-laws could be chosen only by those who were already officers. But though the officers had this power, they had it, not as incorporators, but as officers; and it was not a power which they had a right to use for their individual personal benefit or gain, but only for the good of the corporation. There is no provision in the original by-laws which reserves or secures to the incorporators, as such, any rights or privileges in the corporation, or any right to its profits, or control of its business or assets. When under those by-laws the corporation began the business of assessment insurance by taking in members and issuing to them certificates, the members so made had all the rights and powers which any persons had as members. The choice of officers was neither given to them, nor reserved to the incorporators. It was given to the officers as officers; and the fact that the officers came into the corporation originally by way of being the persons who got the charter was wholly immaterial. So, too, if the amended by-laws were valid, in attempting in 1893 to create a distinct class of active or corporate members, who should alone be eligible to office, and empowered to choose the officers, which we do not now decide, the new by-laws did not purport to give to this peculiar class or body of members as such any ownership of the assets or property of the corporation, or any right to its profits. If either set of the by-laws, rightly construed, purported to give to the officers and agents of the association all its profits, or all the surplus of any of its sources of income over certain expenditures, the by-laws did not purport to confer those rights upon the incorporators or the active members as such, but upon the officers as officers. None of the defendants can show, from either set of by-laws, any right to receive as his own any part of the corporate property as an incorporator or an active member.

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Under the original by-laws, if all of certain sources of income not needed for what are called running expenses could be applied rightfully in the payment of the compensation of the services of the officers, it could only be so applied if necessary to give them a reasonable compensation. This is shown by the fact that those by-laws contemplated that some portion of the admission fees and the annual dues would be invested. But the same conclusion follows from the fact that the officers themselves were the only body who had the power to fix their own compensation, and as between themselves and the corporation they would be limited, necessarily, to giving themselves a just compensation only.

The same result follows from the amended by-laws. If the persons who adopted them were in fact the original incorporators, they adopted them not by virtue of any power reserved to themselves as incorporators, but as officers only, and bound as such to act for the good of the corporation, and not for their private gain. And under the new by-laws also, the persons in office, although incorporators or active members, in managing the business and dealing with the assets, and in paying themselves for their own services, acted simply as officers, and could not give rightfully to themselves more than a just compensation.

3. Some of the demurrers also say "that the petition is argumentative." The allegation is stated baldly, without specifying any particular part of the bill as open to the objection. The demurrers, so far as they go upon this ground, cannot be sustained unless the whole bill is so permeated with this fault of pleading that it cannot fairly be construed to state in direct terms any facts which entitle the plaintiff's to equitable relief. While there are in these bills some matters which are pleaded argumentatively, and are not plainly and directly charged, as, for instance, some statements that officers of the association, and the defendants "conspiring to defraud," or "conspiring to appropriate unlawfully," or "further conspiring to defraud," did certain acts, in the main the allegations of the bills are plain and direct, and are not open to the objection that they are argumentatively stated. This ground of demurrer, being addressed to the bill as a whole, is unsound and must be overruled.

4. The remaining ground is that the bills seek discovery of

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matters within the plaintiff's knowledge. But it does not appear from the bills that the matters concerning which discovery is sought are within the plaintiff's knowledge.

Demurrers overruled.

ELLEN S. HALE, executrix, *vs.* CHARLES W. LEATHERBEE, assignee.

Suffolk. December 13, 1899. — March 7, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Claim against Insolvent Estate — Mortgage as Security to Note.

A. made a promissory note to B. and gave him a mortgage of real estate as security therefor. B. indorsed the note and assigned the mortgage to C. *Held*, on the insolvency of B., that C., who declined to deliver up the mortgage, had no mortgage or pledge of the estate of B., and hence was not forbidden or restrained in his proof by Pub. Sts. c. 157, § 28, or by any other provision of the statute.

APPEAL from a decree of the Court of Insolvency, disallowing a claim of the appellee against the estate of Leace W. Eddy, an insolvent debtor, of which the appellant was assignee in insolvency. The case was submitted to the Superior Court upon the following statement of facts.

One Nathan Hatch made a promissory note, payable to Leace W. Eddy, or order, who indorsed the same to George S. Hale, the testator of the executrix; payment thereof was duly demanded at maturity, of Hatch, who neglected to pay the same, and due notice of non-payment was given to Eddy and to his assignee in insolvency. Eddy filed his voluntary petition in insolvency on November 23, 1897, and at the adjourned third meeting held, on October 28, 1898, prior to the making of any first dividend, the claim in respect of the note was duly presented to the Court of Insolvency, and was thereupon disallowed; and the executrix appealed. At the time of the presentment of the claim for proof the executrix had other security for the note, consisting of a mortgage of real estate given by Hatch to Eddy, to secure the note, and by Eddy assigned to the testator at the time when the note was indorsed to him. At the time of the insolvency

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and at the time of the presentment of said claim for proof, the land mortgaged belonged to one Stowell, who had not assumed or agreed to pay the mortgage; and the executrix declined to sell, release, or deliver up the mortgage.

In the Superior Court, the appellee demurred to the appellant's statement of claim, assigning as ground therefor "that by said statement, the appellant admits that she has property held as security for said note which has not been sold, released, or delivered up, pursuant to the statute in such case made and provided." *Bishop*, J., overruled the demurrer, found that the appellant was entitled to prove her claim, and ordered that the same be allowed against the estate of Eddy. The assignee appealed.

A. Lord & C. Hunneman, for the appellant.

R. W. Hale & F. W. Grinnell, for the appellee.

BARKER, J. It is said that there is in equity a rule which requires that a creditor who has two funds for the payment of his debt, must, as against other creditors who have but one, resort first to that fund in which the other creditors have no right, and claim out of the common fund only to the extent that the fund in which the others have no interest falls short. Story Eq. Jur. § 633. Colt, J., in *Merchants' National Bank* v. *Eastern Railroad*, 124 Mass. 518, 524. If a rule, it does not have universal application.

A creditor holding security which, but for his lien would be part of the insolvent's estate for general distribution, cannot prove his whole claim under the bankruptcy laws of England, or of the United States, or in our own proceedings in insolvency. Yet even such a creditor is allowed to prove his whole claim in proceedings for the administration of the assets of an insolvent national bank under the banking laws of the United States. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131. But under our St. 1876, c. 236, where a creditor held notes of his debtor as security for other notes of the same debtor, only single proof was allowed. *Third National Bank* v. *Eastern Railroad*, 122 Mass. 240. *Merchants' National Bank* v. *Eastern Railroad*, 124 Mass. 518.

Generally the holder of negotiable paper upon which two or more parties are liable to him, may prove his whole debt in

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bankruptcy or insolvency against the estate of any such party, without regard to the fact that he has also the liability to himself of the other parties as another fund to which he can resort for payment. *Sohier* v. *Loring*, 6 Cush. 537, 548. *Fuller* v. *Hooper*, 3 Gray, 334, 342. *Dickinson* v. *Metacomet National Bank*, 130 Mass. 132, 136.

There are instances in which a creditor who has a right to call upon two or more parties for payment of his demand, one of whom has given him, or to a trustee for his benefit, property as security, may prove his whole claim in bankruptcy or insolvency against the estates of the other debtors. *Cabot Bank* v. *Bodman*, 11 Gray, 134. *Richardson* v. *City Bank*, 11 Gray, 261. *Dickinson* v. *Metacomet National Bank*, 130 Mass. 132. See *Savage* v. *Winchester*, 15 Gray, 453, 454, 456; *Bristol County Savings Bank* v. *Woodward*, 137 Mass. 412, 413.

So also there are instances in which a creditor has been allowed to prove for the whole amount of his debt, when some other person is also liable to him for the same debt, and that other person holds security to indemnify himself, which security has been given him by the debtor against whose estate the claim is offered for proof. *Agawam Bank* v. *Morris*, 4 Cush. 99. *Meed* v. *Nelson*, 9 Gray, 55. *Provident Institution for Savings* v. *Stetson*, 12 Gray, 27. But see *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175; *New Bedford Institution for Savings* v. *Hathaway*, 134 Mass. 69.

In our court, before we had an insolvency law, the creditor of the insolvent estate of a deceased person, holding as security for his debt a mortgage of real estate given to him by the deceased, was allowed to claim only for the difference between his debt and the value of the property mortgaged. *Amory* v. *Francis*, 16 Mass. 308. This course has always been followed in such cases. See *Hooker* v. *Olmstead*, 6 Pick. 481; *Towle* v. *Bannister*, 16 Pick. 255; *Middlesex Bank* v. *Minot*, 4 Met. 325; *Gray* v. *Coffin*, 9 Cush. 192, 201, 202; *Savage* v. *Winchester*, 15 Gray, 453; *Haverhill Loan & Fund Association* v. *Cronin*, 4 Allen, 141; *Merchants' National Bank* v. *Eastern Railroad*, 124 Mass. 518, 524; *Bristol County Savings Bank* v. *Woodward*, 137 Mass. 412; *Franklin County Bank* v. *Greenfield Bank*, 138 Mass. 515, 522, *Washburn* v. *Tisdale*, 143 Mass. 376. See *White* v. *White*, 169 Mass. 52, 57.

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Our earliest insolvency law was St. 1838, c. 163. In the section stating what demands might be proved was a provision that when a creditor had a mortgage or pledge of or a lien upon property of the debtor as security, the property so held as security, if the creditor required, should be sold and the proceeds applied toward the payment of his debt, and he be admitted as a creditor for the residue; or he might release and deliver up to the assignee the property so held, and be admitted as a creditor for his whole debt; and if the property was not so sold or delivered up, the creditor was not allowed to prove any part of his debt. St. 1838, c. 163, § 3. In substance, these provisions have remained in our insolvency laws. Gen. Sts. c. 118, § 27. Pub. Sts. c. 157, § 28.

It was out of proceedings under the insolvency statute of 1838 that arose the cases of *Lanckton* v. *Wolcott*, 6 Met. 305, and *Richardson* v. *Wyman*, 4 Gray, 553, principally relied upon by the appellant in the present case. In the first case, Wolcott held a joint judgment against Mallory, Royce, and Kent, arising from notes of which they were joint makers; and he had as security a mortgage given by Mallory, for whose benefit the notes had been given. Mallory, Royce, and Kent had each been in insolvency under St. 1838, and each had received a discharge under the act. Wolcott had been allowed to prove in the insolvency proceedings against Royce his whole debt, and the assignee of Royce had been ordered to pay a dividend thereon. The assignee appealed, insisting that the mortgage should first be applied in liquidation of the debt, and the balance only be proved against the estate of Royce; and this contention was sustained by the decision.

In the other case, a creditor held a mortgage of land given by three tenants in common to secure their joint and several note. Wilson, one of the debtors, being in insolvency, the commissioner, upon the application of the creditor, ordered Wilson's assignee to sell one undivided third of the land at auction, and to pay to the creditor the net proceeds of the sale, and further ordered that the creditor after deducting the proceeds and making a further deduction of twice the amount of the proceeds, as the value of the two third parts remaining unsold, be allowed to prove the balance of his debt against the estate of Wilson.

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It was said by the court that there was no doubt but that the creditor must be restricted in the proof of his claim against the estate of Wilson to such balance only as should appear to be due him after the whole value of the mortgage property had been deducted. *Richardson* v. *Wyman*, 4 Gray, 553, 554.

In *Lanckton* v. *Wolcott*, the question had been stated and left undecided whether the term "debtor" in that part of St. 1838, c. 163, § 3, concerning the proof of claims by secured creditors, meant any person liable for the debt, or was to be limited to the insolvent whose estate was in the progress of settlement. But in *Richardson* v. *Wyman*, it was settled that the provision requiring the sale or surrender of the property of the debtor held in mortgage is applicable only to the property of the insolvent. In *Richardson* v. *Wyman*, the creditor was within the statute as to the one third of the land which was mortgaged to him by Wilson, the insolvent against whose estate he was attempting to prove, and did not contest his obligation to apply the value of the other two thirds of the land before making proof for the balance. The only contention was as to the method of arriving at the value of the two thirds mortgaged by Wilson's co-debtors. *Lanckton* v. *Wolcott*, therefore, stands alone in this respect, that only in that case was the rule laid down necessary to the result reached.

The grounds of the decision in *Lanckton* v. *Wolcott* as stated in the opinion were, that Mallory, Royce, and Kent were joint debtors. That if Mallory had paid part of the debt he would thereby have made the debt smaller as to Royce as well as himself. That if Wolcott had foreclosed the mortgage made by Mallory it would to the extent of its value have made the debt smaller as to Royce as well as to Mallory. That it is a general rule of equity that where a final settlement is to be made, as in cases of bankruptcy or insolvency, all mutual accounts shall be balanced, and a pledge of property held as security be deemed in the nature of a set-off or payment, and an extinguishment of debt *pro tanto;* and that the balance only is the amount to which the creditor has trusted to the personal responsibility of the debtor, and it is for that amount only that he can come in, *pari passu*, with other creditors who have relied on the same responsibility. As applied to the actual facts of the case, the state-

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ment that the balance only was the amount to which the creditor had trusted to the personal responsibility of Royce is shown to have been untrue by the fact that when the notes were given no security was taken, the mortgage having been given subsequently. The only true equity existing sprang from the circumstance that Royce was, as between Mallory and himself, only a surety for Mallory, a fact which was said not to be of much importance, and that Wolcott had security upon property of the principal debtor. It was going a very long way, however, to hold that Wolcott should not have the full benefit of Royce's absolute promise to him to pay the whole of the joint debt.

Richardson v. *Wyman* adds nothing to the statement of the grounds of the decision in *Lanckton* v. *Wolcott*, but the bald statement that whatever other property than that of the debtor against whose estate the claim is offered for proof the creditor holds as security, ought also to be appropriated to the payment of the debt, with an assertion that this is an equitable rule which will do justice to all parties. No doubt the creditor holds the security only for the purpose of appropriating it to the payment of his debt, but there is a decided difference, to him as well as to the creditors of such of his joint debtors as did not give him the property held as security, between his making the appropriation before and after he has received his dividends from the insolvent estates of those debtors. Whether, because in *Lanckton* v. *Wolcott* and in *Richardson* v. *Wyman* the debtor against whose estate proof was offered and the debtor who had furnished the unrealized security were joint debtors, those cases were rightly decided, it is not now necessary to inquire.

Since *Lanckton* v. *Wolcott* was followed in *Richardson* v. *Wyman*, it has been considered several times in our decisions. In *Cabot Bank* v. *Bodman*, 11 Gray, 134, 136, both of the cases were cited in the decision in support of the proposition that where there are several debtors, all equally liable for the same debt, although one of them only should become insolvent, the property of either or of all the others, which has been pledged or mortgaged for the security of the performance of their common obligation, must be availed of by the creditor before he can prove his claim against the estate in insolvency of the former;

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and it was noticed that the property the value of which must so be deducted belonged to persons who were principals in the indebtedness. *Cabot Bank* v. *Bodman*, did not depend for its decision upon the doctrine of *Lanckton* v. *Wolcott* and of *Richardson* v. *Wyman*.

In *Dickinson* v. *Metacomet National Bank*, 130 Mass. 132, 136, the two cases were again mentioned and were distinguished, and it was said that in each of them the proving creditor held a mortgage of the property of a joint debtor with the insolvent, the court adding, "It is not necessary for us, therefore, to consider the question, much discussed at the bar, whether upon reconsideration the doctrine of those cases should be affirmed."

In *Wilson* v. *Bryant*, 134 Mass. 291, 296, 297, it was said that the construction there put upon Gen. Sts. c. 118, § 27, might not be thought to be altogether consistent with the decisions in *Lanckton* v. *Wolcott* and *Richardson* v. *Wyman*. Referring to the first of the two cases the decision points out that the mortgage held by Wolcott as security was worth only four fifths the amount of his debt, and says that if it had been equal in value to the debt, the assignee upon proof of the debt would be entitled, on the familiar principles of subrogation, to avail himself to some extent of the security, as otherwise the security would be exonerated to the amount paid by way of dividends. It is then stated that although ordinarily a creditor may in the first instance compel a surety to pay the whole debt, upon such payment the surety has a right to subrogation, and that where the surety's estate is to be administered in insolvency it may be proper to require these equities to be adjusted in the first instance, if it appears that the value of the security, when added to the probable dividends, will exceed the debt, and that this may be a sufficient reason for applying a rule of equity outside of the statute, to restrain the proof of the claim. As there were no such equitable considerations as to bring the case directly within *Lanckton* v. *Wolcott*, the inquiry was not pursued further. It was also said that, the grounds of the decision in *Wilson* v. *Bryant* being different from those of *Richardson* v. *Wyman*, it was not necessary to say whether they would lead to a different result under a state of facts precisely like those presented in *Richardson* v. *Wyman*.

It is reasonably clear why the decision in *Wilson* v. *Bryant*

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spoke in this way of *Lanckton* v. *Wolcott* and *Richardson* v. *Wyman*. The reason was that the rule applied in those cases may, when the value of the property held as security is less than the amount of the debt, do injustice to the creditor, by depriving him of the full benefit of his contract with the debtor against whose estate he is seeking to prove. A just rule would give him the full benefit of that contract, which is his property, while, as intimated in *Wilson* v. *Bryant* it would give to the assignee of the surety or co-debtor by way of subrogation the benefit of the security, so far as it was not necessary to make whole the creditor to whom it was given.

The two cases are again mentioned in *Franklin County Bank* v. *Greenfield Bank*, 138 Mass. 515, 523, and it is pointed out that in *Richardson* v. *Wyman* a part of the property mortgaged was not, and a part was, within the statute, and that in *Lanckton* v. *Wolcott*, the property mortgaged was not within the statute; and it is said of both cases that, whether correctly decided or not, the court acted on what it deemed equitable principles.

The two cases were cited in *Nichols* v. *Smith*, 143 Mass. 455, 459, as authority for the proposition, that the same equitable principles, as to the effect upon the security of proof in full of a secured claim without giving up the security, should be applied when the security is within the terms of the statute, as are applied when the security is not within the statute; and it is said that in both cases the right which the assignee or the general creditors acquire in the security is an equitable right, to be determined on equitable principles; and that when the security consists of property not belonging to the insolvents, or of property of the insolvent held as security by one jointly liable with him on the debt, the court will not allow the debt to be proved when the security is within the control of the creditor offering the proof.

In *Champion* v. *Buckingham*, 165 Mass. 76, 80, concerning a policy of insurance assigned as collateral by the insured who had become bankrupt, and his wife who was the beneficiary in the policy, the security really coming, not from the bankrupt, but from the wife, the court deemed it unnecessary to consider whether, in a case to which the United States bankrupt act

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applied, the rule laid down in *Lanckton* v. *Wolcott* should govern, or that followed in the United States courts and in England, citing *In re Cram*, 1 Nat. Bankr. Reg. 504; *In re Alexander*, 1 Lowell, 470, 472; and *In re Holbrook*, 2 Lowell, 259.

The present case does not come within the provisions of the statute regulating the proof of claims in insolvency by secured creditors. Pub. Sts. c. 157, § 28. Although the mortgage was given by the person who is liable upon the appellee's note as maker, that person is not the insolvent against whose estate proof is offered. Besides this, the mortgagor has parted with the equity of redemption, and the property held as security belongs neither to the maker of the note upon which the appellee founds his demand, nor to the insolvent against whose estate he seeks to prove his claim. Nor are the facts such as to require us to hold that the same course should be followed in dealing with the offer of proof which was taken by the court in *Lanckton* v. *Wolcott*.

In that case the debtor who had furnished the security and the debtor against whose estate the creditor offered proof were joint debtors. Here the debtor who gave the security and the debtor against whose estate proof is made are not joint debtors. The liability of one is that of the maker of a promissory note, and the liability of the other is that of an indorser. The two liabilities did not arise from the same act, and are not of precisely the same nature. What affects the rights of one debtor does not necessarily affect the rights of the other in the same way and to the same extent as if they were joint debtors.

Here the liability of the debtor who furnished the security arose upon the issue of the note, and was not with but to the present insolvent, who was the payee of the note. The liability of the present insolvent arose from the contract which he saw fit to make with the appellee's testator when the latter bought the note, and was the conditional contract of an indorser, which has become a fixed liability by demand, non-payment, and notice. The contracts are distinct in origin and several. Each party is bound to pay to the holder the whole amount of the note. The one who does pay the whole is entitled, upon making such payment and not before, to the possession of the note and

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to such security as the holder then had. If the maker pays, the payment gives him no right against the indorser. Having himself furnished the security, he keeps it as his own, and he can only use the paid note as a voucher. If the indorser pays, he can sue the maker upon the note itself, and he can apply the security to his own indemnity. There is no question of contribution between them as between joint debtors. Until the indorser pays in full, he has no right to demand possession of the note or any control over the security, the holder's right being to have the benefit of the security to himself until he is fully paid. See *Beals* v. *Mayher*, 174 Mass. 470.

The doctrine that the proof in insolvency of a secured debt shall be governed by equitable considerations is established and applies to the present case, whether *Lanckton* v. *Wolcott* and *Richardson* v. *Wyman* were rightly or wrongly decided. But it is not equitable to deny a creditor a right which he holds. The general principle of every insolvent law is that each creditor shall have a right to share in the assets in proportion to the amount which at law is owing to him from the insolvent. Unless allowing him to prove for that amount will infringe the right of some one else, to forbid him to make full proof is to deny his right and to refuse to give him the benefit of his contract. On the other hand, it is in effect to give to the other creditors of the insolvent the privilege of availing themselves of the security without paying the note in full.

Our insolvency statute provides that all debts due and payable from the debtor may be proved and allowed against his estate. Pub. Sts. c. 157, § 26. The appellee in this case has such a debt. He has no mortgage or pledge of estate of the debtor against whose estate he offers proof. So he is not forbidden or restrained in his proof by Pub. Sts. c. 157, § 28, or by any other provision of the statute.

This is as far as it is necessary for the creditor to go. The assignee says that the appellee is a secured creditor, and that a secured creditor, although not forbidden or restrained by the statute, must still exercise his right so as to do equity. Granted. It is then for the assignee to show that in proving his whole debt the creditor will infringe equitable rights. Unless this is shown no principle of equity restrains the creditor from exercis-

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ing his rights; and unless it is shown, to restrain him is to treat him inequitably and to give to the other creditors what is not their due. The other creditors have no equitable right to say that the appellee shall not have the full benefit of the contract between her testator and the insolvent. Their equitable right is to have their own claims proved at a just amount, and to have recognized and enforced all equities growing out of the relation of the insolvent to the demand offered for proof. Until the appellee receives full payment of the note, neither the insolvent, the assignee, nor the general creditors have an equitable right to prevent the creditor from realizing by means of his security the full payment of his debt. Where the creditor by means of his security and his proof receives his whole debt, his rights in the security and in the estate of the insolvent stop. If at the outset the value of the security and the value of the assets of the insolvent estate, as compared with the amount of the claims provable against it, are such as to show that the creditor will receive from both his funds more than the amount of his debt, the facts disclose an equitable right in the security on the part of the insolvent estate, which may be enforced by a restraint in the proof without doing injustice perhaps to the creditor. But when it is not shown that such a state of facts exists it is not necessary for the preservation of the equitable rights of the insolvent and his assignee and other creditors that the creditor be restrained in his proof. Our insolvency courts have full equity powers and jurisdiction in all insolvency matters pending in them. St. 1894, c. 164. If at any time it appears that equitable relief is necessary to enable the assignee or the general creditors of the insolvent to enjoy their equitable rights of subrogation to the creditor's security, such relief can be afforded after as well as before proof of the debt in full.

Decree affirmed.

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ISABEL HOLT *vs.* MOSES H. ROBERTS.
SAME *vs.* THOMAS HARRISON.

Middlesex. March 9, 1900. — March 12, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

Petition to vacate Judgment — Matter apparent on Record — Appeal.

A petition under St. 1895, c. 234, to vacate a judgment of the Superior Court is properly denied, and the judgment must be affirmed, if there is nothing on the record which this court can consider under the appeal.

HOLMES, C. J. These are two petitions under St. 1895, c. 234, to vacate judgments of the Superior Court in replevin for a return and damages, rendered upon nonsuits. The petitions were denied on hearing in the Superior Court, and the petitioner appealed. Nothing appears on the record beyond these bare facts. The petitions allege, to be sure, that the damages recovered are the value of the chattels ordered to be returned, and that thus she is charged twice for the same things. We are asked to look at a document which purports to be the charge to the jury who assessed the damages, and which, it is said, supports the allegation. But the document is no part of the record and cannot be considered by us. Moreover, it appears by the certificate of the justice who denied the petitions that the charge was before him at the hearing. We cannot know what explanations or further facts were proved, and of course cannot say that his decision not to retry the cases must have been wrong. *Cobb* v. *Hale*, 172 Mass. 387.

Petitions denied and judgments affirmed.

P. H. Hutchinson, for the petitioner.

J. H. Colby & E. A. Bayley, for the respondents.

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HYMAN B. ROSENTHAL *vs.* WILLIAM NOVE & another.

Worcester. October 3, 1899. — March 21, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & LORING, JJ.

Action — Suggestion of Bankruptcy — Stay of Proceedings — Special Judgment — Bond — Sureties.

After a verdict and before judgment the defendants in an action were adjudicated bankrupts under U. S. St. of July 1, 1898, and thereafter they filed a suggestion of that fact and moved that all proceedings be stayed. This motion was denied and a special judgment entered to enable the plaintiff to proceed against the sureties upon a bond, given more than four months before the bankruptcy, to dissolve an attachment. *Held*, that the court had power to overrule the motion for a stay, and to direct the entry of a special judgment.

TORT, for personal injuries. Writ dated July 7, 1898. Trial in the Superior Court, before *Hopkins*, J., who overruled a motion for stay of proceedings and directed that a special judgment be entered; and the defendants alleged exceptions. The facts appear in the opinion.

W. S. B. Hopkins & R. Hoar, for the defendants.

J. R. Thayer & A. P. Rugg, for the plaintiff.

BARKER, J. After verdict and before judgment, the defendants were adjudicated bankrupts, and thereafter they filed a suggestion of that fact and moved that all proceedings be stayed. This motion was denied and a special judgment entered to enable the plaintiff to proceed against the sureties upon a bond, given more than four months before the bankruptcy, to dissolve an attachment. The exceptions raise the question whether the court had power to overrule the motion for a stay, and to direct the entry of a special judgment. The answer depends upon the provisions of the United States Bankruptcy Act of July 1, 1898.

Section 11 of that act is as follows:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication,

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or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

"The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

"A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

"Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."

Under the definitions contained in the statute this language includes persons who have filed voluntary petitions, and applies to all claims provable in bankruptcy from which a discharge in bankruptcy would be a release, and the court which may order the trustee of the bankrupt estate to enter his appearance in and to defend any suit pending against the bankrupt is the court of the United States having jurisdiction of the bankruptcy. U. S. St. of July 1, 1898, § 1.

The construction of the provisions quoted for which the defendants contend is that they are peremptory, and compel the court in which a suit is pending against a bankrupt at the time of the adjudication to stay further proceedings for twelve months, or until the question of discharge is determined. A strong argument against this construction is found in the use of the words "shall be stayed until after an adjudication" and the words "such action may be further stayed" which follow. The provision that a suit pending against the bankrupt at the time of the filing of the petition shall be stayed until after adjudication or dismissal is in terms peremptory. If in case of an adjudication Congress had intended that a further stay should be peremptory also, the continued use of the word "shall" would have made its meaning clear, and the use of the word "may," ordinarily used as a word of permission rather than of command, is significant.

As against the argument drawn from this use of the word "may," it is to be noticed that the second clause of the section, "The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt," implies that all

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suits pending against the bankrupt may be defended by the trustee of his estate, if he shall be ordered to enter his appearance and defend by the United States court, and that, unless all suits must be further stayed after the adjudication, they may be determined against the bankrupt after the adjudication, and before there is a trustee who can appear and defend. But the fact that a trustee may be ordered to appear and defend assumes that the prosecution of the suit may go on after the adjudication and before the question of a discharge is settled. It is contended, that unless after adjudication a further stay is imperative, the creditor may merge his claim into a judgment, which, being entered after the adjudication, is not provable in the bankruptcy, and from which the bankrupt will not be released by a discharge. But by § 63, claims are provable which are founded on provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge.

In order to release property which has been attached, or to prosecute an appeal or procure a review of questions at first decided against a defendant, he must often secure the plaintiff's demand by the individual undertaking of some third person. One provision of the law in question covers such cases, providing that "Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor." U. S. St. of July 1, 1898, § 57.

The natural meaning of the concluding part of the clause is that the person by whose individual undertaking the creditor's claim is secured shall have a right in the dividend on account of that claim proportionate to the part of his own undertaking which he has discharged. If this clause is to have operation in every instance in which a creditor's claim is secured by the individual undertaking of a third person, the creditor must not have power, between the time of the commencement of the bankruptcy proceedings and the time when claims may be proved, to so deal with a claim that it cannot be proved, and thereby to deprive the surety of his right. It is urged that unless the further stay

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of proceedings is peremptory after the adjudication as well as before, the creditor, by merging his provable claim into a general judgment entered after the adjudication, may prevent the surety from exercising his right. If the original claim no longer exists, it is contended that the surety cannot prove it, and that the judgment cannot be proved because it accrues after the bankruptcy proceedings are commenced. But the provision already referred to allowing proof of judgments entered after the adjudication upon provable debts deprives these contentions of weight.

An argument may perhaps be drawn from the provisions of the act relating to liens. It is provided "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid." U. S. St. of July 1, 1898, § 67.

In the case of a collusive suit against the bankrupt, in which there is an attachment of his land subsequently conveyed in fraud of his creditors, the suit pending at the time of the filing of the petition, if there is no peremptory stay of the suit after the adjudication, the colluding plaintiff may defeat the attachment by entering a discontinuance in his suit, and thus prevent the preservation of the attachment for the benefit of the estate. But the trustee of the bankrupt can avail himself of the collusive attachment only by a further prosecution of the suit in which it was made.

The considerations noticed do not seem to us to require the adoption of the construction for which the defendants contend. Congress was legislating upon a subject as to which its power is unquestionable. Successive bankruptcy acts had been in turn enacted and repealed. Numerous State insolvency laws had

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been in force in the intervals when no bankruptcy act had been in force. Under the last previous bankruptcy act, no suit or proceeding upon a provable debt could be prosecuted against the bankrupt until the question of his discharge should have been determined, and any such suit or proceeding must, upon his application, be stayed to await the determination of the bankruptcy court on the question of the discharge, unless there was unreasonable delay on his part. U. S. St. of March 2, 1867, § 21. U. S. Rev. Sts. § 5106. *Ray* v. *Wight*, 119 Mass. 426. *Hill* v. *Harding*, 107 U. S. 631. This requirement of a stay, if asked for by the debtor, might well operate to inflict upon creditors such serious delay in enforcing their rights against other persons than the bankrupt as is shown in the case last cited, where for several years the creditor could not place himself in a position to resort to his admitted security. See *Hill* v. *Harding*, 130 U. S. 699.

Congress chose the language of the present statute in view of that of the former bankruptcy act, and of the decisions under it, and of its practical operation. If the power of the bankrupt to force a stay for twelve months, or until the question of his discharge should be settled, of all suits pending against him at the initiation of the bankruptcy proceedings, was a feature which Congress wished to place in the new act, it need choose no ambiguous language. If it wished to make a different provision, and thought it more reasonable to provide for a peremptory stay, without any request therefor, in all cases until the question of an adjudication or the dismissal of the petition was determined, and to leave the question of any further stay to the determination of the court in which the action was pending, no more apt words could have been used than those which Congress has adopted. We see no good reason to give them in the enactment now in question any other than their usual meaning, and we hold that the court in which a suit against a bankrupt is pending is not, after the adjudication of bankruptcy, bound to stay proceedings further therein, while it may do so if, and to such an extent as, justice may require. The action is not absolutely barred, and the court has power to proceed to judgment. *Holland* v. *Martin*, 123 Mass. 278.

The defendant's bill of exceptions may perhaps be said to be

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intended to raise only the question which we have decided. But the court below had power to grant a further stay of proceedings, and the defendants argue upon their brief, that justice required such a further stay for two reasons, first, because the cause of action not having been put into a judgment when the bankruptcy proceedings were begun, it must be, if proved at all, assessed and ascertained in bankruptcy, in the usual method of proof, unless under the order of the bankruptcy court, it should be liquidated in some other manner, or unless it should be wholly defeated in a defence of the suit undertaken by the trustee by order of the same court. The second reason urged is that the course pursued will prevent the surety upon the bond to dissolve the attachment from proving the claim in bankruptcy and being thereupon subrogated to the right of the plaintiff to a dividend out of the bankrupt estate.

Assuming, without so deciding, that the question whether justice required the court below to grant a further stay after the adjudication is open, we are of opinion that no injustice was done by entering the special judgment upon the verdict.

It is to be noted that the questions whether the plaintiff had a good cause of action, and the amount of his damages recoverable of the defendants because of that cause of action had been settled in favor of the plaintiff and against the defendants and their sureties upon the bond to dissolve the attachment, by the verdict of a jury, in a trial in which no exceptions had been saved, and that a new trial, application for which had been made by motion to the court, had been denied. All this had been done before the commencement of the bankruptcy proceedings. The right of the plaintiff to recover of the defendants, a definite amount of damages and his legal costs had thus been fixed by a legal jury, and could not be otherwise re-examined in any court of the United States than according to the rules of the common law. U. S. Const. Amendm. art. 7. Therefore, the fact of the defendants' liability and its amount, could not be re-examined in the bankruptcy court. That would not be a re-examination according to the rules of the common law. Nor could those facts be re-examined, as of course, in the court in which the action was pending, if the trustee came in, under an order of the bankruptcy court. In the circumstances of the case, no

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appeal lay from the court in which the suit was pending to any other court, and all common law methods of examining the questions of the defendants' liability and its amount had been already exhausted or waived, unless it may have been a motion on account of newly discovered evidence or a writ of error, or of review.

No harm is shown to have been done to the bankrupts or to their sureties or to their creditors by way of forestalling an assessment of the bankrupts' liability to the plaintiff at a less amount than that already fixed by the verdict. It is not suggested that there was ground for asking a new trial on account of newly discovered evidence, or for a writ of error or review.

Nor could the entry of a special judgment to enable the plaintiff to proceed against the sureties to the bond to dissolve the attachment give the plaintiff power to proceed against the person or the property of the bankrupts in case they procured a discharge in bankruptcy. The provisions authorizing a special judgment are found in Pub. Sts. c. 171, §§ 23, 24, and in St. 1885, c. 59, as amended by St. 1892, c. 209. Such a special judgment is to be enforced in the first instance only against the sureties on the bond, and even if that remedy is insufficient no enforcement of the judgment can be had against the person or the property of the bankrupt unless he is refused or unreasonably delays to prosecute his application for a discharge in bankruptcy. Nor, in our opinion, would the entry of such a special judgment affect the right of the surety upon the bond to dissolve the attachment, to prove the claim in bankruptcy in the name of the plaintiff, and to be subrogated to the plaintiff's right to a dividend. Those rights are given to the surety in these words: —

"Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor." U. S. St. of July 1, 1898, § 57.

The surety's rights under this clause are fixed as of the time of the commencement of the bankruptcy proceedings. All that is required to enable him to prove a claim then secured by his

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individual undertaking is that the creditor shall fail to prove the claim. If the entry of the special judgment works any merger of the original cause of action as between the plaintiff and the bankrupt, such a merger could not justly prejudice or annul the right of the surety under the language quoted, to prove the claim as it existed at the commencement of the bankruptcy proceedings, when his own rights were fixed. The general purpose of bankruptcy proceedings is to make a ratable and just division of the debtor's estate among those entitled at the commencement of the proceedings to share in its distribution.

The surety who had paid has a just right to share, if for any reason the creditor whose claim he has secured does not share in respect to the debt, and the special judgment cannot have any effect to make the surety's right to a dividend unjust either to the bankrupt or to the other creditors.

In the view which we have taken we find it unnecessary to consider whether the plaintiff's cause of action was a provable claim under the bankruptcy law, or whether if provable it would be affected by the defendant's discharge in bankruptcy. See U. S. St. of July 1, 1898, §§ 17, 63.

The construction which we give to the statute is entirely consistent with the spirit of the bankruptcy law as shown in the provision that "the liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." U. S. St. of July 1, 1898, § 16. In our opinion it was not the intention of Congress unnecessarily to interfere in any way with the remedies of the creditor against other persons responsible to him than the bankrupt himself.

Exceptions overruled.

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AMBROSE B. WHITE & others *vs.* JOHN CREAMER & another.

Worcester. January 23, 24, 1900. — March 26, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Injunction — Abatement of Nuisance — Record of Conviction — Plea of Nolo contendere — Evidence.

While a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered, a record showing a conviction on such a plea is not admissible in another proceeding to show that the defendant was guilty.

PETITION, by ten legal voters of the town of Blackstone, under St. 1887, c. 380, to enforce the provisions of St. 1889, c. 114, as to abating a nuisance. The prayers were for an injunction, or for an injunction until the further orders of the court. The answer set out that the petition was against persons, and was brought to enjoin acts within the exclusive jurisdiction of the common law courts, and also that the property should be described in the petition. Hearing before *Lathrop*, J., who reserved the case for the consideration of the full court upon the pleadings and an agreed statement of facts, the material portions of which appear in the opinion.

B. B. Johnson & M. M. Johnson, for the petitioners.

J. W. Corcoran, (*F. N. Thayer & W. B. Sullivan* with him,) for the respondents.

LATHROP, J. It is stated in the agreed facts that the only questions that are to be decided are: 1. Whether the court record containing the plea of *nolo contendere* is competent evidence in this proceeding, against the defendants' objection; and if so, can the prayers of the petition be granted thereon? 2. Such questions as are raised in the answer to the sufficiency of the petition.

It appears from the agreed facts that at the time the petition was brought, namely, July 8, 1899, the defendants Mulvey and Creamer were doing business on the premises described in the petition, and that they had sold, exposed, and kept for sale on

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said premises spirituous and intoxicating liquors to be drunk on the premises since May 1, 1899, and until the filing of this petition. It also appears that on April 29, 1899, licenses, legal and proper in form, of the first and fourth classes under the Pub. Sts. c. 100, were issued to them, running until May 1, 1900.

It further appears that on May 4, 1898, similar licenses were issued to them; and that a complaint was made on July 6, 1898, to the Second District Court of Southern Worcester, alleging that the respondent Creamer on July 3, 1898, at Blackstone, "unlawfully did keep for sale intoxicating liquors, with intent then and there unlawfully to sell the same"; and that on July 11, 1898, Creamer pleaded *nolo contendere*, and was adjudged guilty, and sentenced to pay a fine of $100, which he paid.

The contention of the petitioners is, that, although there was no violation of the license issued in 1899, the proceedings in the District Court amount to a conviction, and under the St. of 1889, c. 114, amending the Pub. Sts. c. 100, § 18, no license could issue to Creamer for a year after such conviction. The clause referred to of the St. of 1889, c. 114, after providing for penalties for violating the provisions of a license, is as follows: "A licensed person who violates any provision of his license shall, in addition to said penalties, forfeit his license, and be disqualified to hold a license for the period of one year after his conviction."

The principal question which has been argued, is as to the effect of the plea of *nolo contendere*. We do not doubt that a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered. *Commonwealth* v. *Horton*, 9 Pick. 206. *Commonwealth* v. *Ingersoll*, 145 Mass. 381. But we are of opinion that a record showing a conviction on such a plea is not admissible in another proceeding, to show that the defendant was guilty. A plea of *nolo contendere* is not an express confession of guilt, as is a plea of guilty, but is merely an implied confession. If the plea is accepted, the defendant is bound by it, and may be sentenced; but he is not estopped to plead not guilty in an action for the same fact. 2 Hawk. P. C. (8th ed.) c. 31, § 3. This has been recognized as the law of this Commonwealth. *Commonwealth* v. *Horton*, *ubi supra*. In *Commonwealth* v. *Tilton*, 8 Met. 232, it was said by

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Chief Justice Shaw: "This plea, like a demurrer, admits, for the purposes of the case, all the facts which are well stated, but is not to be used as an admission elsewhere." So, in *Commonwealth* v. *Ingersoll*, 145 Mass. 381, it was said by Chief Justice Morton: "It is an implied confession of guilt only, and cannot be used against the defendant as an admission in any civil suit for the same act." See also *Peacock* v. *Hudson Quarter Sessions*, 17 Vroom, 112. The same view is adopted by the modern text writers. Mr. Bishop, speaking of this plea, says: "The difference between it and guilty appears simply to be, that while the latter is a solemn confession which may bind the defendant in other proceedings, the former is a confession only for the purposes of the particular case." 1 Bish. Cr. Pro. § 802. See also Whart. Cr. Ev. (9th ed.) § 577; Washb. Man. Cr. Law, (2d ed.) 131; Heard, Cr. Pl. 263.

The case of *Commonwealth* v. *Horton*, 9 Pick. 206, relied upon by the petitioners, while it recognizes the law to be that a plea of *nolo contendere* is not admissible against the person pleading it in a civil proceeding for the same act, holds that a conviction under such a plea is admissible against a third person, in an action on a recognizance entered into by him to the government, the condition of which is that a person licensed to retail spirits should observe the laws relating to such retailers for one year, the person so licensed having afterwards been convicted upon a plea of *nolo contendere*.

We have no occasion to consider whether this case was rightly decided or not. The question before us is not whether a third person might be liable under such circumstances, but whether the record is evidence in another proceeding brought against the person who made the plea of *nolo contendere*.

The petitioners have addressed to us a learned argument to show the origin of the rule, and contend that the plea of *nolo contendere* differs from the plea of guilty in its effect upon collateral matters, only in civil and criminal actions for trespass to the person. Very likely the effect of the plea may have first been considered in cases of this kind; but we see no reason why it should be confined to them; and we are content to follow Chief Justice Shaw and Chief Justice Morton in the views which they expressed in the cases above cited.

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It is unnecessary, therefore, to consider the other questions argued, or to decide whether, if Creamer had pleaded guilty instead of pleading *nolo contendere*, the present petition could be maintained. See *Carleton* v. *Rugg*, 149 Mass. 550.

Petition dismissed.

LEONARD HOWARTH, receiver, *vs.* BENJAMIN LOMBARD, JR.

Suffolk. January 16, 1899. — March 27, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Liability of Stockholder of Corporation organized in another State.

A shareholder, who is a citizen of this State, in a State bank of Washington is bound by the constitution and laws of that State which entered into the contract by which he took his shares; and a receiver of the bank duly appointed and authorized there, may recover in Massachusetts the amount of an assessment laid by the Superior Court of Washington upon the defendant as such shareholder.

CONTRACT, by the receiver of the Traders' Bank of Tacoma, a State bank of Washington, against one of the shareholders, a citizen of Massachusetts, to collect from him a final assessment to pay the debts of the corporation as prescribed by the statutes of Washington. The defendant demurred to the declaration, assigning as grounds therefor: 1. Want of equity; 2. That it did not appear by the declaration that under the laws of this Commonwealth the defendant was under any liability to the plaintiff; 3. That the plaintiff could not, as receiver of a foreign corporation, recover upon the cause of action set forth in the declaration; 4. That the liability, if any, could only be enforced by the laws of the State of Washington. The Superior Court sustained the demurrer and ordered judgment for the defendant; and the plaintiff appealed. The facts appear in the opinion.

The case was argued at the bar in January, 1899, and afterwards was submitted on briefs to all the justices except *Barker* and *Loring*, JJ.

H. R. Bailey, (*J. W. Saxe* with him,) for the plaintiff.

R. Bradford, (*E. G. McInnes* with him,) for the defendant.

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KNOWLTON, J. This is an action brought by the plaintiff as receiver of the Traders' Bank of Tacoma, in the State of Washington, to recover the amount of an assessment laid by the Superior Court of that State upon the defendant as a stockholder. A demurrer was filed which was sustained by the Superior Court, and the case comes before us on an appeal from a judgment for the defendant.

The constitution of Washington contains this provision: "Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares." Const. of Wash. art. 12, § 11. A statute which is made a part of the plaintiff's declaration is in these words: "Each and every stockholder shall be personally liable to the creditors of the company, to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise; provided, that the stockholders of every bank incorporated under this act or the territory of Washington shall be held individually responsible, equally and ratably," etc. (then following the exact language of the constitution). 1 Wash. Code, § 1511. It is averred that this statute was in force at the time of the organization and incorporation of the Traders' Bank, and has been ever since. The statutes do not more particularly define the nature of this liability, and they contain nothing as to the means of enforcing it. The meaning of the language in reference to the particular nature of the obligation and the method of enforcing it was left to be determined by the courts. Several decisions of the Supreme Court of Washington have been made in regard to it. In one case the court uses this language: "It will be seen that there is no language which in express terms gives the creditors the immediate or any right of action. The liability is not on, but for, the contract, debt, or agreement. That the liability so provided is in addition to that flowing directly from the holding of stock which has not been fully paid for. The latter, in event of the insolvency of the corporation, is held to

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be a trust fund for creditors, and there is no good reason why the same should not be held as to the former. No satisfactory reason can be given for holding one to be a trust fund and the other not to be. There is no principle by which the two classes of liability can be distinguished further than that one is primary and the other secondary; for while it is true that one can be enforced by the corporation itself, and the other only by creditors, yet they were both created for the benefit of the corporation in carrying on its business, and to secure to creditors the payment of its obligations. If the liability which is clearly primary must be treated as a trust fund for the benefit of all of the creditors of the corporation, greater reason exists why a liability which is secondary only, and created entirely for the benefit of the creditors, should likewise be treated as such trust fund. There is nothing in our constitution which defines the method by which this liability shall be made available. Hence the method must be determined by the courts, and their aim should be to prescribe one which will accomplish the object of the provision with the least inconvenience to the creditors, without unnecessary annoyance to the stockholders." *Wilson* v. *Book*, 13 Wash. 676, 679. See also *Watterson* v. *Masterson*, 15 Wash. 511. It is decided that this liability cannot be enforced directly by individual creditors, but only by a receiver duly appointed, and by him only after the application of the available assets of the corporation to the payment of its debts. This construction of the statute, made by the highest court of the State in which it was enacted, is binding upon us. *Hancock National Bank* v. *Farnum*, 176 U. S. 640.

The principal question in the case is, whether such a liability can be enforced against stockholders in this Commonwealth. It is familiar law that statutes do not extend *ex proprio vigore* beyond the boundaries of the State in which they are enacted. If they are merely penal, they cannot be enforced in another State. If they furnish merely a local remedy for the invasion of a recognized right which is protected elsewhere in other ways, they cannot be given effect in another jurisdiction. *Richardson* v. *New York Central Railroad*, 98 Mass. 85, 89. The fundamental question is whether there is a substantive right originating in one State and a corresponding liability which follows the

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person against whom it is sought to be enforced into another State. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced *ex comitate* in another State, unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him. If the statute creating the right is against the policy of the law of the neighboring State, that is a sufficient reason for refusing to enforce the right there. In the neighboring State, in such a case, it will not be considered a right. If the enforcement of a statutory right in a neighboring State in the manner proposed will work injustice to its citizens, considerations of comity do not require the recognition of it by the courts of that State. If the right by the terms of the statute creating it is to be enforced by prescribed proceedings within the State, the right is limited by the statute, and can only be enforced in accordance with the statute. If it is of such a kind that, with a due regard for the interests of the parties, a proper remedy can be given only in the jurisdiction where it is created, it will not be enforced elsewhere. But if there is a substantive right of a kind which is generally recognized, courts through comity ought to regard it, and enforce it as well when it arises under a statute of another State as when it arises at common law, unless there is some good reason for disregarding it. These seem to be the reasons and principles which govern the action of the courts in cases of this kind. See *Erickson* v. *Nesmith*, 15 Gray, 221; *S. C.* 4 Allen, 233; *Halsey* v. *McLean*, 12 Allen, 438; *Smith* v. *Mutual Life Ins. Co.* 14 Allen, 336, 342; *Post* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341; *Bank of North America* v. *Rindge*, 154 Mass. 203; *Higgins* v. *Central New England & Western Railroad*, 155 Mass. 176; *Walsh* v. *New York & New England Railroad*, 160 Mass. 571; *Hancock National Bank* v. *Ellis*, 166 Mass. 414; *S. C.* 172 Mass. 39.

The question whether the liability in cases of this kind is contractual or only statutory has been answered differently in different jurisdictions. In *Burch* v. *Taylor*, 1 Wash. 245, 248, a case which has since been modified in other particulars, it is said that the liability is contractual, and although in the other decisions

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of that State we have seen no other direct statement upon the subject, we understand them virtually to hold the same thing. It is not the statute which directly and proximately creates the liability; it is the voluntary action of the stockholders under the statute, followed by action of creditors which is founded on the action of the stockholders. This statute was in existence before the Traders' Bank was organized. The stockholders subscribed for their stock with full knowledge of the statute, and they must be held impliedly to have agreed to be bound by it. The statute enters into and forms a part of their undertaking as stockholders, and their implied agreements in that relation conform to it. It is to be noticed under this statute that stockholders, merely by subscribing for stock, without an express promise to pay for it, are bound in all corporations to pay the amount of their unpaid subscriptions, if needed, and in banking corporations to pay as much more, if it is called for to satisfy creditors. In this respect their undertaking is like that of stockholders in many other States, but unlike that of stockholders in Massachusetts who become such under statutes which provide for the collection of stock subscriptions by selling the stock to pay the assessment upon it. See *New Haven Horse Nail Co.* v. *Linden Spring Co.* 142 Mass. 349, 354. Although the liability is founded on a statute, there is a contractual element entering into it. The undertaking is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the additional sum to create a fund for creditors if the corporation should become insolvent and a receiver should be appointed to collect it. It was said by Mr. Justice Field in *Post* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, 344, that such an obligation "is *quasi ex contractu*." In *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372, Mr. Justice Shiras says: "Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation." In *Hawthorne* v. *Calef*, 2 Wall. 10, it is decided to be contractual in the

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sense that under the Constitution no subsequent statute can impair the obligation. See also *Hancock National Bank* v. *Ellis*, 166 Mass. 414; *Flash* v. *Conn*, 109 U. S. 371; *Huntington* v. *Attrill*, 146 U. S. 657; *Casey* v. *Galli*, 94 U. S. 673; *United States* v. *Knox*, 102 U. S. 422; *Richmond* v. *Irons*, 121 U. S. 27, 55; *Dexter* v. *Edmands*, 89 Fed. Rep. 467; *Howell* v. *Manglesdorf*, 33 Kans. 194, 199; *Ferguson* v. *Sherman*, 116 Cal. 169. The weight of authority is in favor of holding this statutory liability to be also contractual. At all events, it is a liability which corresponds to a substantive right that grows out of voluntary action which is in the nature of an implied promise to the corporation that is being formed, and to those who may become creditors of the corporation. This action is followed by the completion of the organization of the corporation, and the giving of credit to the corporation by those who trust, in part at least, to the implied promise of the stockholders. If the voluntary action is a purchase of stock instead of an original subscription for it, the principle is the same. Such a right ought to be enforceable.

Inasmuch as the nature of it and the method of enforcing it depend upon the statute which enters into the implied contract, we must look to the statute to ascertain its extent and the manner of enforcing it. If it is of such a nature as to call for local proceedings in the State where the corporation is, in order to adjust equities, such proceedings must be had, and it cannot be made effectual without them. Most of the cases in which creditors of foreign corporations have been refused relief in this Commonwealth have shown rights which, under the statutes creating them, could not properly be enforced without proceedings in the foreign State whereby equities could be adjusted. In the present case, as the statute has been construed, it is plain that no action can be maintained against a stockholder until after proceedings in a court of Washington, showing the insolvency of the corporation and the need of payment to satisfy the claims of creditors. After such proceedings, and an adjustment of the rights and liabilities of the corporation, of creditors, and of stockholders, collection can be made from stockholders wherever they are found.

In *Hancock National Bank* v. *Ellis*, 166 Mass. 414; *S. C.* 172 Mass. 39, the plaintiff was allowed to recover because a substan-

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tive right had grown up which had been held by the court of Kansas to be contractual, and because the preliminary proceedings in Kansas had been taken, which were necessary under the statute to the enforcement of the right in other jurisdictions. These proceedings, which were merely the recovery of a judgment against the corporation with proof that it could not be collected in the ordinary way, removed the only limitation upon the right to proceed by action against any stockholder wherever he might be found. All having been done that the statute required to be done, it was held that, as against one who had become a stockholder in a corporation governed by such a law, there was no injustice in allowing the plaintiff to proceed in our courts.

In the case at bar a receiver of the Traders' Bank has been appointed, the amount of its assets and liabilities has been judicially determined, the necessity for an assessment upon stockholders and the amount of the required assessment have been ascertained, an assessment upon all stockholders has been made, and the receiver who is to hold this fund in trust for creditors has been directed to collect it. We see no injustice to the defendant in holding him here to the performance of the obligation which he voluntarily assumed in another State.

The question arises, how far these proceedings in the court of Washington are binding on the defendant. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute, as construed by the local courts, means this as plainly as if every part were expressed. Under the statute the stockholders impliedly agreed that if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, and that if more was needed they would also pay their proper share,

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up to the amount of their subscriptions, to the trustee of this additional fund, for the benefit of creditors. The determination of the questions involved are a part of the proceedings of the court in the administration of the affairs of a local insolvent corporation. The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts, so to be ascertained. The ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation. *Elderkin* v. *Peterson*, 8 Wash. 674. *Hawkins* v. *Glenn*, 131 U. S. 319. *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 336. *Glenn* v. *Liggett*, 135 U. S. 533. *Sanger* v. *Upton*, 91 U. S. 56, 58. *Marson* v. *Deither*, 49 Minn. 423, 426. *Lewis* v. *Glenn*, 84 Va. 947, 970, 979. *Hamilton* v. *Glenn*, 85 Va. 901. *Glenn* v. *Williams*, 60 Md. 93, 116.

That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided. See cases last above cited. The rule is discussed at length in *Hawkins* v. *Glenn*, *ubi supra*. Under the statute now before us we can see no difference in principle between the secondary liability and the primary liability referred to in the above quotation from the opinion in *Wilson* v. *Book*, 13 Wash. 676. Each grows out of the same statute and the same undertaking. Each is founded on an implied promise made in pursuance of the requirements of the statute. In reference to each, the subscriber for stock contemplates the same kind of proceedings, and a collection by the same officer, who represents not only such assets as the corporation has for all purposes, but the right to a special fund, which is an asset that can be collected and used for creditors only. In *Cole* v.

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Satsop Railroad, 9 Wash. 487, and *Hardin* v. *Sweeney*, 14 Wash. 129, it is held that the receiver is the only person who can collect this fund. This is equivalent to saying that it can be collected only of those who are stockholders at the commencement of the proceedings, and that while it is not in the narrow sense an asset of the corporation, it is an asset to be used by the receiver and the court for the benefit of the corporation and of the creditors, in administering the affairs of the corporation. See *Wilson* v. *Book*, 13 Wash. 676, 679; *Irons* v. *Manufacturers' National Bank*, 21 Fed. Rep. 197. There is as much reason for holding the proceedings of the court binding upon absent stockholders in this part of the administration of the affairs of the corporation as in the collection of unpaid subscriptions. The primary fund and the secondary fund are both to be administered under the order of the court. The court, in making assessments for unpaid subscriptions, does not act merely as the representative of the directors, who might have made such an assessment, but by virtue of its general power to do all that is proper in settling the affairs of the corporation.

These assessments are in principle like the assessments made by the court upon the members of insolvent mutual fire insurance companies under the laws of this Commonwealth, which are binding upon the members to whom no actual notice is given. *Commonwealth Ins. Co.* v. *Wood*, 171 Mass. 484. The only difference is that our statutes in regard to mutual insurance companies prescribe the manner of making an assessment, while in the case at bar the court acts under the general provisions of the statutes.

The general liability under the statute in Washington is like that under the national banking act of the United States, and the court has construed the statute in such a way as to make the practical application of it substantially the same. Under that act assessments made by the comptroller are binding upon stockholders, although made without notice to them. U. S. Rev. Sts. § 5234. *Casey* v. *Galli*, 94 U. S. 673. *United States* v. *Knox*, 102 U. S. 422. *Richmond* v. *Irons*, 121 U. S. 27, 55. *Bailey* v. *Sawyer*, 4 Dillon, 463. *Brown* v. *Smith*, 88 Fed. Rep. 565. The reason for holding them binding is that the obligation is contractual, and that it contemplates the possibility of such an assessment.

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Of course the defendant may show if he can that he is not a stockholder of this bank, or not a stockholder for so large an amount as alleged, or may make any other defence that is personal to himself. But we are of opinion that, as a member of the corporation, he is bound by the decision of the court of the State where the corporation was organized, made in administering its affairs in insolvency and determining the amount of its assets and liabilities and the amount of the assessment which should be made upon the stockholders.

The remaining question is whether an action upon the liability so determined can be maintained by the receiver in his own name. It has been held that an ordinary appointment as receiver, made in another State, will not enable the appointee to sue in this Commonwealth in his own name. *Wilson* v. *Welch*, 157 Mass. 77. If he has a right of property as assignee, he may maintain an action. *Fort Payne Coal & Iron Co.* v. *Webster*, 163 Mass. 134. *Ewing* v. *King*, 169 Mass. 97. Under a recent statute an assignee of an ordinary chose in action may sue in his own name. St. 1897, c. 402. The tendency is toward greater liberality in this respect. *Buswell* v. *Order of Iron Hall*, 161 Mass. 224, 229. In the present case the receiver is called by the court in Washington a quasi assignee for creditors. He is charged with the administration of a trust fund which does not take form or come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors he is the owner of the legal title to this fund as a trustee for the creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could, legally demand and collect the money. We are of opinion that the action is rightly brought in his name.

In a case brought by this plaintiff to collect a part of this same assessment, the Court of Appeals in the State of New York, affirming a decision of the appellate division of the Supreme Court of that State, (*Howarth* v. *Angle*, 39 App. Div. N. Y. 151,) has recently held that the plaintiff may recover in an action at law against a stockholder in that State. *Howarth* v. *Angle*, 162 N. Y. 179. A similar decision has also been made in favor of this plaintiff against another stockholder by the United States Cir-

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cuit Court for the Northern District of New York. *Howarth* v. *Ellwanger*, 86 Fed. Rep. 54. On this last question the judge in the opinion says: "The defendant Woodworth was not a party. But whether parties or not, the law seems clear that the stockholders are bound by the order making the assessment." See also to the same effect *Sheafe* v. *Larimer*, 79 Fed. Rep. 921. On the general question many similar decisions under various statutes have been made elsewhere. *Whitman* v. *Oxford National Bank*, 176 U. S. 559. *Hancock National Bank* v. *Farnum*, 176 U. S. 640. *Hale* v. *Hardon*, 95 Fed. Rep. 747. *Bell* v. *Farwell*, 176 Ill. 489. *Western National Bank* v. *Lawrence*, 117 Mich. 669. *Whitman* v. *National Bank of Oxford*, 83 Fed. Rep. 288. *Guerney* v. *Moore*, 131 Mo. 650. *Rhodes* v. *United States National Bank*, 66 Fed. Rep. 512. *Bagley* v. *Tyler*, 43 Mo. App. 195. *McVickar* v. *Jones*, 70 Fed. Rep. 754. *National Bank of Oxford* v. *Whitman*, 76 Fed. Rep. 697. *American Freehold Land Mortgage Co.* v. *Woodworth*, 79 Fed. Rep. 951. *Schiffer* v. *Columbia College*, 87 Fed. Rep. 166. *Mechanics' Savings Bank* v. *Fidelity Ins. Co.* 87 Fed. Rep. 113; *S. C.* 91 Fed. Rep. 456. *Brown* v. *Trail*, 89 Fed. Rep. 641. *Platt* v. *Larter*, 94 Fed. Rep. 610. *Western National Bank* v. *Reckless*, 96 Fed. Rep. 70, and cases above cited. Other somewhat similar cases which have been decided in favor of the defendant either differ materially from the present case in their facts, or rest upon reasoning which does not seem to us convincing. See *Marshall* v. *Sherman*, 148 N. Y. 9; *Hancock National Bank* v. *Farnum*, 20 R. I. 466; *Crippen* v. *Laighton*, 69 N. H. 540.*

Demurrer overruled.

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* A similar decision was made on the same day in Suffolk, in the case of

GEORGE H. KING, receiver, *vs.* JAMES W. VINAL & others.

BILL IN EQUITY, in the Superior Court, by the receiver of the Washington Savings Bank of Seattle, in the State of Washington, against James W. Vinal and six others, all citizens of this Commonwealth, to enforce a decree of the Superior Court of King County, in that State, authorizing and directing the plaintiff to collect from the stockholders of the bank the amounts for which they were found to be liable under the statutes of that State.

Hearing before *Hopkins*, J., who found that the liability of stockholders to creditors under the statutes of Washington and the decisions of the Supreme Court of that State is a contractual liability; that the plaintiff, by reason of his appointment as receiver, became entitled to all the assets of the Washington Savings Bank, and became trustee of said assets for all the

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ARTHUR WILKINSON & others *vs.* JOHN A. STITT & others.

Bristol. October 23, 1899. — March 27, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Equity — Holding of Prize Cup under a Trust — Bills involving Interests of trifling Amount — Wagering — Public Policy — Bill by some for all Members of a Class against some representing all of another Class.

A bill in equity alleged in substance that a cup was held by the defendants under an agreement in the nature of a trust by which it was to be "raced for" on Labor Day of 1896, 1897, and 1898, and "to be delivered by the club holding the same immediately after such a race to the club represented by the bicycle team winning said race, and said cup to become the property of said club represented by the team winning the race" of 1898. The N. Cycle Club, of which the defendants were members, won the cup in the race of 1897, and received the same from the winners of the preceding year, and have ever since held it "upon the trusts" aforesaid. The T. Club, of which the plaintiffs were members, won in the race of 1898, and it became the duty of the N. Club to deliver the cup to the T. Club. *Held*, that the bill sufficiently set forth a trust, and that it was the duty of the N. Club as the trustee holding the cup to deliver it to the T. Club

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creditors; that under certain decisions of the Supreme Court of the State of Washington it has been held that said statutory liability is to be enforced by the receiver for the benefit of all the creditors of said bank, and when realized is to be applied to the payment of claims of all creditors *pro rata* and irrespective of residence; and also by certain decisions of said court that individual creditors cannot enforce it, and that no person other than the plaintiff has the right to enforce the same.

The judge entered a decree in favor of the plaintiff, and, at the request of the defendants and with the consent of the plaintiff, reported the case for the consideration of this court. If the above findings were correct, the decree was to stand; otherwise the case was to be remanded for a further hearing.

G. E. Smith & W. F. Garcelon, for the defendants.

G. L. Wilson, for the plaintiff.

KNOWLTON, J. This is a suit to recover certain assessments made by the Superior Court of the State of Washington upon the defendants as stockholders in a banking corporation. All of the questions argued before us are covered by the decision in *Howarth* v. *Lombard*, *ante*, 570, and we need not consider them further. No question was raised as to the number of shares held by different stockholders. No objection was made to the joinder of the defendants in a suit in equity, nor to anything else in the form of the proceedings. We have not found it necessary to determine whether, if objection were made, a formal amendment would be necessary.

Decree affirmed.

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in accordance with the terms of the trust, and that that duty might be enforced under the general jurisdiction in equity.

The fact that a cup has a value apart from the sixty dollars which it cost, arising from its having been put up as a prize in a bicycle race and its having been won by one of the competing clubs, distinguishes this case, which is a bill in equity to compel another club to carry out the trust by virtue of which it holds the cup, from decisions, in which it is held that this court sitting in equity will not entertain jurisdiction of bills involving pecuniary interests of trifling amount.

Racing for a cup which was offered as a prize for a series of bicycle races between the members of three specified clubs, and was purchased by the voluntary subscriptions of persons not members of any of the three associations, is not betting, gambling, or wagering, and is not against public policy.

A bill in equity brought by some in behalf of all members of a class against some representing all members of another class is considered as brought by all the members of the plaintiff class against all the members of the defendant class, each class being represented by the particular members named in the bill as parties plaintiff and defendant; and it is not a suit which must be brought by an officer or under authority given so to do. The proper allegations as to why all the members of each class are not joined must be made in the bill, and the court must be satisfied at the hearing that those bringing the suit for all the plaintiffs, and those against whom the suit is brought as representing all the defendants, fairly represent the members of the class in question.

BILL IN EQUITY, by the plaintiff Wilkinson, and two others, on behalf of themselves and other members of the Thistle Road Club, against the defendant Stitt, and four others, and all other members of the New Bedford Cycle Club and the Crescent Cycle Club, the bill alleging that the Thistle Road Club and the New Bedford Cycle Club "are both voluntary associations or clubs, each having a large number of members, too numerous to name in this bill of complaint;" and that the Crescent Cycle Club "is a corporation duly organized according to law and located in said New Bedford." The prayer was that the New Bedford Cycle Club might be decreed to carry out and execute the trusts and agreement by which it held a certain cup and to deliver the same to the Thistle Road Club, and for an injunction. The defendants demurred, assigning various grounds therefor. The Superior Court sustained the demurrer, and the plaintiffs appealed. The facts appear in the opinion.

M. R. Hitch, (*W. B. Perry* with him,) for the plaintiffs.

F. A. Milliken & A. E. Clarke, for the defendants, submitted the case on a brief.

HAMMOND, J. One of the grounds of demurrer is that the plaintiffs have a complete and adequate remedy at law, namely, replevin to recover the cup or trover for damages.

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The bill sets out in substance that this cup is held by the defendants under a certain agreement in the nature of a trust by the terms of which the cup was to be "raced for for three consecutive years, to wit, the years 1896, 1897, and 1898," on Labor Day of each year, "the cup to be delivered by the club holding the same immediately after such a race to the club represented by the bicycle team winning said race, and said cup to become the property of said club represented by the team winning the race" of 1898.

The New Bedford Cycle Club of which the defendants are members won the cup in the race of 1897, and in accordance with the terms of the agreement received the same from the winners of the preceding year, and has ever since held the cup "upon the trusts" aforesaid. The Thistle Road Club of which the plaintiffs are members won in the race of 1898, and therefore it became the duty of the New Bedford Club to deliver the cup to the Thistle Road Club.

We are of opinion that the bill sufficiently sets forth a trust, and that it is the duty of the New Bedford Club as the trustee holding the cup to deliver it to the Thistle Road Club in accordance with the terms of the trust, and that that duty may be enforced under the general jurisdiction in equity.

This is not a bill under Pub. Sts. c. 151, § 2, cl. 4, to compel the redelivery of goods secreted so that they cannot be redelivered, but is a bill to enforce a trust under the general jurisdiction. Even when the terms of a trust have been so far complied with that the fund has been reduced to money, the amount due the *cestuis que trust* ascertained and the only duty remaining upon the trustee is to pay over that amount, we have never supposed that the fact that an action for the money had and received would lie at law was sufficient to oust the jurisdiction of the court in equity to compel the delivery of the money of the *cestuis que trust* elected to proceed in that court.

And we see no reason why there should be any different rule where the only remaining duty of the trustee is to deliver the single identified chattel held by him in trust. See *Holden* v. *Hoyt*, 134 Mass. 181, 184 *et seq.* and authorities cited.

This ground of demurrer must therefore be overruled.

The other causes of demurrer assigned by the defendant are

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also without merit. The fact that the cup in question has a value apart from the sixty dollars which it cost, arising from its having been put up as a prize in a bicycle race and its having been won by the Thistle Road Club, distinguishes this case from *Cummings* v. *Barrett*, 10 Cush. 186; *Smith* v. *Williams*, 116 Mass. 510; and *Sandford* v. *Wright*, 164 Mass. 85, in which it was held that this court sitting in equity would not entertain jurisdiction of bills involving pecuniary interests of trifling amount. The contention that racing for this cup, which was offered as a prize for a series of bicycle races between the members of three specified clubs, and was purchased by the voluntary subscriptions of persons not members of any of the three associations, is betting, gambling, or wagering, or is against public policy, is too plainly untenable to require discussion.

The further contention that the bill is faulty in not alleging that the plaintiffs are authorized to bring suit, and in not alleging that the defendants are officers of, or authorized to act for, the New Bedford Cycle Club, or that they are individually in possession of the cup, is founded on a misapprehension of the character of the bills brought by some in behalf of all members of a class against some representing all members of another class. Such a suit is considered as being brought by all the members of the plaintiff class against all the members of the defendant class, each class being represented by the particular members named in the bill as parties plaintiff and defendant; it is not a suit which must be brought by an officer or under authority given so to do. In such a suit, the proper allegations as to why all the members of each class are not joined must be made in the bill, and the court must be satisfied at the hearing that those bringing the suit in behalf of all the plaintiffs and those against whom the suit is brought, as representing all the defendants, fairly represent the members of the class in question.

Demurrer overruled.

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HARRINGTON A. PINE & others *vs.* EDWIN M. WHITE & another.

Suffolk. December 5, 1899. — March 27, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Alleged Delinquency in Management of Trust Estate.

A trustee cannot be held liable for a mere error of judgment in making or failing to make an investment unless the error is so gross as to show that he either acted in bad faith or failed to exercise sound discretion.

In this case, which was a bill in equity to charge a trustee for failure to buy for the trust estate property closely connected with it, which was offered for sale for much less than its value, it cannot be said, in view of the uncertainties disclosed by the testimony and the opportunity that the judge had of seeing the witnesses, that his decision in favor of the defendant was wrong.

BILL IN EQUITY, by Harrington A. Pine, the Massachusetts Universalist Convention, and Frank W. Grinnell, trustee, against Edwin M. White and Fanny F. White to charge the said Edwin M. for delinquency in management of a trust under the following residuary clause of the will of James A. Pine.

"After deducting the aforesaid expenditures, I give, bequeath, and devise all the residue of my estate to said Jeremiah L. Newton, his heirs and assigns, nevertheless in trust for the use and benefit of my son Harrington A. Pine during his natural life to be paid in the manner following, viz.: After deducting all necessary expenses, charges of administration and taxes, I direct my said executor and trustee to pay over to or expend for the benefit of my said son the income of my said estate at such times and in such manner as in his judgment he shall think best for the interest and welfare of my said son so long as he shall live; and at his decease, after the payment of all burial charges and suitable expenses connected therewith, to pay over or assign the residue of said estate to the Massachusetts Convention of Universalists so called to be made use of by that body at their discretion either for Home Missionary work or for helping weak societies. And to make my said executor and trustee to manage and control my said estate for the purposes and uses aforesaid, I

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hereby empower and give him the right and power to lease or dispose of, if necessary in his judgment, any part or all of my said estate, and execute all deeds and papers necessary to pass title to the same, and invest and reinvest the proceeds derived therefrom in such manner and in such securities as he may think best for the uses and purposes aforesaid."

Trial in the Superior Court before *Hardy*, J., who found for the defendants and reported the case for the determination of this court. The facts appear in the opinion.

The case was argued at the bar in December, 1899, and afterwards was submitted on briefs to all the justices.

R. W. Hale & F. W. Grinnell, for the plaintiffs.

T. J. Morrison, for the defendants.

KNOWLTON, J. This is a suit in equity to charge a trustee for delinquency in the management of the trust estate. It comes before us on a report which shows certain special findings of fact in favor of each of the parties, and a general finding that on the whole evidence there should be a decree for the defendants.

A brick house in Boston had belonged to Caroline Pine, who had died intestate on February 22, 1879, leaving her husband, James A. Pine, and two sons, Harrington A. Pine and Henry C. Pine of Worcester. Harrington A. Pine conveyed his interest in the house to his father, James A. Pine, who died on July 4, 1882, leaving a will by which he made one Newton his executor and trustee. Newton qualified as executor but not as trustee, and died before August, 1884. His widow was appointed administratrix of his estate soon after his death. On September 22, 1884, the defendant, Edwin M. White, was appointed trustee under the will of James A. Pine, and on November 17, 1884, administrator with the said will annexed. The undivided half of the brick dwelling-house in Boston conveyed by H. A. Pine to his father, passed to the trustee under the residuary clause of the will, and formed a part of the trust estate when White was appointed trustee. Previously to the death of James A. Pine, Henry C. Pine had died intestate, without issue, leaving a widow Agnes E. Pine. His estate was duly administered, and at the time of White's appointment the title to the brick dwelling-house stood one half in the trust estate and one half in Agnes E. Pine. There was no administration of the estate of Caroline

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Pine until January, 1885, when the defendant Edwin M. White was appointed administrator. Said White testified that on April 17, 1885 he had no notice of any debts of Caroline Pine, and Harrington A. Pine testified that he lived with his mother part of the time and she did not, to his knowledge, leave any debts. E. M. White had no knowledge of the trust property until just before he was appointed trustee, and then only in connection with his appointment. This brick dwelling-house was incapable of partition by metes and bounds. There was in the hands of Newton, executor of the estate of James A. Pine, $723.74 at the time of his death, as shown by his accounts, which was paid over to the defendant White on May 6, 1885, and which formed a part of the estate held by him under his trust. Agnes E. Pine lived in Worcester and was connected with an opera company, and was away from her home much of the time. On April 17, 1885, she conveyed her undivided half of the brick dwelling-house for $450, when its assessed value was $1,800, and its real value, as found by the judge, was $1,400. The deed was made to the defendant Edwin M. White, and on the same day another deed was made from him to his sister Fanny F. White, the other defendant, who is found by the judge to have furnished the purchase money. Nearly ten years afterwards Fanny F. White conveyed to one McIntosh, who on the same day conveyed in mortgage to the defendant Edwin M. White to secure the payment of $600 to him as trustee, and then conveyed the equity of redemption to said Edwin M. White. These last three deeds all bore date November 1, 1894, and were recorded March 9, 1895, and were parts of one transaction which actually took place at about the latter date. McIntosh was a mere conduit to pass the title. The consideration which Fanny F. White received for the property was $1,400. On April 15, 1896, Edwin M. White conveyed the equity of redemption back to Fanny F. White, who still holds the title. In this last transaction the property was rated at the same price. Fanny F. White was a surety on the bond of her brother as trustee.

The plaintiffs contend that the trustee is chargeable for his failure to make this purchase as trustee, on the ground that he obtained knowledge of the ownership and of the opportunity to buy at this low price through his relation to the estate as trus-

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tee, that the nature of his interest in the house as trustee was such as to make it his duty to buy the other undivided half, if he could at a reasonable price, in order to relieve the trust estate from the limitations which come from the ownership of only an undivided share in such property, and that he had at his command, or easily could have obtained from the administrator of Newton's executor, money belonging to the trust more than enough to pay for the half which was sold; that his sister Fanny F. White was chargeable with knowledge of his duties and liabilities as trustee; and finally that the relations of Fanny F. White to the property were colorable, and that he was the only real party interested in the purchase.

The judge had the advantage of seeing the witnesses, and in such a hearing findings of fact cannot be set aside unless they are plainly wrong. *Crowell* v. *Keene*, 159 Mass. 352. Both the defendants testified that the money paid to Agnes E. Pine for the property belonged to Fanny F. White, and that her brother acted as her agent in making the purchase. Although there were strong grounds for suspicion that he was really acting for himself alone and not for his sister in taking the title, there is no sufficient evidence to warrant us in holding that the finding of the judge on this point was erroneous.

The case on this finding is one in which a trustee failed to buy for the trust estate property closely connected with it, which was offered for sale at much less than its value. It is not a case in which he personally profited by an investment which he ought to have made for the trust, because it was his sister and not he who was the principal in making the investment. Ordinarily a trustee is not liable for failing to make a particular investment so long as he uses his funds in making proper investments. It is not contended that he failed to invest the money properly unless he was bound to invest it in the purchase of this real estate. The contention is that he was bound to buy this undivided half because the value of the other half, which was a part of the trust estate, would be materially enhanced by joining this part to it so as to give control of the property, and because of the low price at which it could be bought.

It was his duty to act in good faith and to exercise a sound discretion, and it may be that a proper management of the trust

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estate required him to invest a part of the money in the purchase of this half of the house. If the judge had so found and had held him liable for his neglect, we should have been disinclined to disturb the finding. It is plain that the original investment in an undivided half of the house would have been made more valuable by obtaining control of the other half and uniting the ownership. If the trustee had at his command money for investment, enough to buy the other half, and saw the opportunity to buy it at much less than its value, it was his duty to make the purchase.

The reasons which he gave in his testimony for not making it are, first, that he did not then have the money and did not know when he could obtain it, and secondly that facts came to his knowledge which made him doubt the validity of the title. In view of the fact that within less than three weeks after the purchase he received from the administrator of the executor $723.74, most of which it was his duty to invest, and inasmuch as it is also found that this had long been due, that he made no effort to obtain it for this purchase, and no attempt to give the trust estate the advantage of this opportunity to purchase, we are of opinion that the evidence warranted a finding that he did not use due diligence to get the money, if it was his duty to try to obtain it and purchase the property. He testified, however, that he had frequently called on the administrator of the deceased executor for this money, although he made no special inquiry or effort to get it when he learned of the opportunity to make the purchase. The presiding judge probably doubted whether he had reason to think that he could speedily get it.

The other reason that he gave for not buying is that the title seemed doubtful. He testified that the consideration stated in the deed from Harrington A. Pine to his father James A. Pine was $300, and that this small consideration would naturally lead one to think that there was some imperfection in the title, or something affecting its value. He also testified that in his opinion there was a possibility of the existence of creditors of Caroline Pine, who might be entitled to payment out of her estate, and that these claims might diminish the personal property in the estate of James A. Pine, which he received from her, or make it necessary to sell this real estate to pay the debts.

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We must assume that the judge who heard the evidence decided that he acted in good faith and in the exercise of a sound discretion in omitting to purchase the share of Agnes E. Pine for the trust, and in acting as the agent of his sister in making the purchase for her. In view of the uncertainties disclosed by the testimony and the opportunity that the judge had of seeing the witnesses, we cannot say that his decision in favor of the defendants was wrong. A trustee cannot be held liable for a mere error of judgment in making or failing to make an investment, or in his management of the trust estate in other respects, unless the error is so gross as to show that he either acted in bad faith or failed to exercise that sound discretion which the law requires of all trustees in the performance of their official duties. *Brown* v. *French*, 125 Mass. 410. *Dickinson, appellant*, 152 Mass. 184. In determining the weight of the evidence given by the trustee to justify his conduct, his appearance and manner were important. The facts and evidence reported do not satisfy us that the findings of the judge were erroneous.

Bill dismissed.

CLARA P. ALBRO *vs.* CITY OF FALL RIVER.

Bristol. December 7, 1899. — March 27, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Change of Grade — Original Construction — Specific Repairs — Seasonable bringing of Petition — Statute.

Work having been done in repairing a way and not as original construction or as specific repairs, the verdict should have been for the petitioner, as the petition was seasonably brought under Pub. Sts. c. 52, §§ 15, 16.

If a change of grade is made by an authority competent to establish the grade, and the nature and extent of the change are specifically declared in the proceedings, the work is a specific repair under Pub. Sts. c. 49; but if the work is done or ordered by an authority which does not have the power to establish the grade, or if done or ordered by such an authority, the order does not specify the nature and extent of the change, and the change is made under an authority competent to direct the repair of ways so that they may be safe and convenient for travellers, the change is made under Pub. Sts. c. 52, and the damages are recoverable under that chapter.

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PETITION, under Pub. Sts. c. 52, §§ 15, 16, for damages caused by the raising of the grade of Lincoln Avenue in Fall River. Trial in the Superior Court, before *Fessenden*, J., who stated that a single question which in certain aspects might be considered by the full court as material to the case was whether the surveyor of highways, when he made the change of grade, intended to perform that act in his official capacity to repair the way, or as specific repairs under and by authority of the orders introduced in evidence, and submitted the following question to the jury, "Was the work done by the surveyor of highways for the purpose of repairing the way?" The jury answered the question in the negative. The judge, at the request of the respondent, directed the jury to return a verdict for the respondent; and the petitioner alleged exceptions, which appear in the opinion.

J. F. Jackson & A. S. Phillips, for the petitioner.

L. E. Wood, for the respondent.

BARKER, J. In the year 1897 the street in front of the petitioner's lot was raised between three and four feet, and the petitioner was damaged thereby to the amount of $1,163. These damages she now seeks to recover. Her petition for damages was filed with the mayor and aldermen after the commencement of the work and within one year from its completion. The mayor and aldermen made no adjudication upon it, and she filed the present petition within one year from the expiration of thirty days from the time of filing her petition to the mayor and aldermen, but more than one year after the completion of the work done in 1897.

If the work was done under the provisions of Pub. Sts. c. 52, for the purpose of repairing the way, this petition is seasonably brought, under Pub. Sts. c. 52, §§ 15, 16, and the petitioner is entitled to a verdict for the amount which it is agreed that she was damaged, and interest and costs. If the work was done under the provisions of Pub. Sts. c. 49, authorizing the ordering of specific repairs, the omission from the order of an adjudication of damages to the petitioner was equivalent to an adjudication that she sustained no damage. *Monagle* v. *County Commissioners*, 8 Cush. 360. *Goddard* v. *Worcester*, 9 Gray, 88. *Sisson* v. *New Bedford*, 137 Mass. 255. *Sullivan* v. *Fall River*, 144 Mass. 579, 585. If aggrieved by that adjudication of her damages her

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petition for relief must be brought within one year after the order, and she cannot recover because this petition was not seasonably brought. Pub. Sts. c. 49, § 79.

The street was laid out as a public way in 1872, by an order which fixed its grade, and fixed it higher than that to which the street was brought up by the work done in 1897. But no attempt was made until 1897 to bring the street to the established grade. On the contrary, the street was opened to travel at the grade existing before it was laid out as a public way, and was maintained at that grade until 1897. During all the period repairs were made upon it at that grade, water pipes and sewer were placed beneath its surface, permanent sidewalks and paved gutters and catch basins were built, street lights erected, and hydrants, curbings, and cross-walks established.

In 1897 a petition was presented to the board of aldermen representing that common convenience and necessity required that the grade of the street be defined for the use of the city, and asking the board to cause the same to be done. Upon this petition the board made an order declaring the grade of the street as accepted in 1872 to be the grade of the street.

On the same day with the adoption of the order declaring the grade to be that of the street as accepted in 1872 the board of aldermen adopted another order authorizing and directing the superintendent of streets to work the street to grade. The defendant contends that the raising of the street was done under this order, and that it was done either as original construction, or as a specific repair under the authority of Pub. Sts. c. 49, while the petitioner contends that the raising of the street was done in repairing the way under Pub. Sts. 52.

The contention is untenable that the work was one of original construction, in other words, a mere completion of the way at a grade established when it was laid out, so that any damages resulting must be deemed to have been occasioned by the laying out of the way. In *Brady* v. *Fall River*, 121 Mass. 262, a street having been laid out in 1870 by an order establishing its grade about a foot higher than that of the street as it was used for travel before it was laid, it was held that work done in 1874 in raising the street to the established grade, under an order of the mayor and aldermen that the superintendent of streets should

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cause the street to be worked to grade, should be considered as work of original construction, and that the damages caused by raising the street to grade were included in the damages for the original location. But in *Cambridge* v. *County Commissioners*, 125 Mass. 529, it was held that when a street laid out with an order establishing the grade at which it was to be constructed was constructed and opened for travel, but not then brought to the grade established in the order of location, if after the lapse of sixteen years the street was raised to that grade, the work done could not be treated as done under the original order of location, and that the original construction and the subsequent repairs were independent proceedings. In the present case the interval allowed to elapse was twenty-five years, and the work of 1897 cannot be treated as original construction under the order of 1872.

Was the order of the board of aldermen an order for specific repairs within the meaning of Pub. Sts. c. 49? The petitioner requested rulings that it was not such an order; that such an order must be concurred in by the common council, and that when the specific repairs are a change of grade, the order must so specify the change that the abutters can determine the proposed grade from the order itself, with the plans and descriptions filed therewith, and that the defendant could not rely on the order.

The distinction between specific repairs ordered under the authority of Pub. Sts. c. 49, and work done under Pub. Sts. c. 52, was thoroughly discussed, and the history of the legislation stated and many of the decisions reviewed in *Sisson* v. *New Bedford*, 137 Mass. 255. The matter was again considered at some length in *Sullivan* v. *Fall River*, 144 Mass. 579, and a rule laid down by which to determine under which of the two chapters a change of grade in a city street is made. If it is made by an authority competent to establish the grade, and the nature and extent of the change are specifically declared in the proceedings, the work is a specific repair under Pub. Sts. c. 49. But if the work is done or ordered by an authority which does not have power to establish the grade, or if done or ordered by such an authority, the order does not specify the nature and extent of the change, and the change is made under an authority

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competent to direct the repair of ways so that they may be safe and convenient for travellers, the change is made under Pub. Sts. c. 52, and the damages are recoverable under that chapter.

In the city of Fall River, the power to establish the grade of a street resides in the mayor and aldermen with the concurrent vote of the common council, and the board of aldermen does not have the power. St. 1854, c. 257, §§ 8, 14. St. 1885, c. 269, §§ 12, 19. Therefore, the orders passed by the board of aldermen on July 2, 1897, were not an order for a specific repair under Pub. Sts. c. 49, and the defendant could not rely upon them as such an order. That they were not intended as such an order is shown by the absence of any attempt to procure concurrent action on the part of the city council, and the fact that there was no attempt to give notice to abutters or persons interested. We have no doubt that they were intended by the board of aldermen as an assertion on their part that the city had a right to treat the grade established when the street was laid out in 1872 as the true grade, and to bring the street to that grade as a work of construction under the original layout, as was done in the case of *Brady* v. *Fall River*, 121 Mass. 262. As we have seen, the interval between the laying out of the way and the order to bring it to the established grade was too great, and the orders of July 2, 1897, cannot be supported on that ground. But the executive power of the city generally resided in the mayor and aldermen; St. 1885, c. 269, § 11; and it was the duty of the city to so repair the street that it should be reasonably safe and convenient for travellers. Pub. Sts. c. 52, § 1. In the discharge of this duty the mayor and aldermen, under their general powers, could give directions to its superintendent of streets. For some twenty-five years there had been an adjudication of the city government that the proper grade, fixed largely in view of the safety and convenience of travel, was one much higher than the then actual grade. Under its general powers the board of mayor and aldermen had competent authority to direct the repair of the street by bringing it to such a grade that it should be reasonably safe and convenient for travel, and in our opinion the orders of July 2, 1897, should be referred to that authority, and be deemed, under the circumstances of this case, an exercise of that authority. It follows,

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that whatever might have been the personal view or the intention of the surveyor of highways, who testified that he did the work of 1897 under the authority of the order of July 2, 1897, and that he did not do it to repair the way, the work was done under an order directing repairs under Pub. Sts. c. 52, and not under Pub. Sts. c. 49.

As in our opinion a verdict should have been ordered for the petitioner, it is not profitable to discuss the separate rulings. The exception to the admission of evidence is not argued. If the case was to be submitted to the jury at all, it should have been submitted more broadly, the true question for decision being under which branch of the statute the work of 1897 was done, rather than with what intention the surveyor of highways acted. *Exceptions sustained.*

FITZ W. GUERIN *vs.* WILLIAM H. STACY & another.

Suffolk. November 15, 1899. — March 28, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Breach of Bond — Liquidated Damages.

A lessee gave a bond to his sublessee conditioned that, if through the acts of the former the lease should be terminated or the sublessee ousted before the expiration of the term, the obligation should remain in force and the obligor should pay the obligee the sum of $2,500 as liquidated damages. The sum named was also the penalty of the bond; and it was implied that if the sublessee should enjoy his term undisturbed the obligation should be void. The bond was dated August 17, 1894. The lease would have expired in July, 1898. It was terminated in July, 1897, and the sublessee, finding that he would be recognized by the owner only as a monthly tenant, gave notice and left the premises on October 22, 1897. *Held*, in an action for a breach of the bond, that the sum named was liquidated damages and not a penalty.

CONTRACT, on a bond of Charles W. Parrish of St. Louis, with William H. Stacy as surety, dated August 17, 1894, for the payment of $2,500 to the plaintiff, on the following condition:

"Whereas, the said Charles W. Parrish has heretofore leased of one Mrs. Riley, the building known as No. 409 North Broadway, in said city of St. Louis, and has sublet to Fitz W. Guerin,

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the fourth and fifth floors thereof; and whereas, said Guerin has expended a large sum of money in improving and arranging said floors for a photograph gallery; and whereas in the lease from the said Mrs. Riley to said Parrish, the right is reserved on the part of Mrs. Riley and her heirs, representatives or assigns, upon the happening or not happening of certain contingencies, to declare a forfeiture of said lease, in which event the term granted by said Parrish to said Guerin would also terminate and expire, and the said Guerin would lose the benefit of said expenditures; and whereas, to indemnify the said Guerin in such event, the said Parrish heretofore executed to him a bond of indemnity with one Edward B. Wolff, as surety, and whereas the said Wolff desires to have the said bond cancelled, and the said Guerin has agreed so to do upon being furnished with these presents in lieu thereof.

"Now, therefore, if through any act or acts on the part of said Parrish, or his heirs, legal representatives or assigns, the said lease should become forfeited or terminated before the expiration of the term for which the said fourth and fifth floors were let to said Guerin, or if through any fault of the said Parrish, the said Guerin should be ousted from said premises before the expiration of his said term (other than the destruction of said building by accidental fire or by the elements), then this obligation shall remain in full force and effect and the said Parrish and his surety hereto shall pay the said Guerin, the sum of twenty-five hundred dollars as liquidated damages."

At the trial in the Superior Court, before *Aiken*, J., the jury returned a verdict for the plaintiff in the sum of $25; and the plaintiff alleged exceptions, which appear in the opinion.

G. F. Manson, for the plaintiff.

J. W. Spaulding, for the defendants.

HOLMES, C. J. This is an action upon a bond given by a lessee to his sublessee, and conditioned that if through the acts of the former his lease should be terminated or the sublessee ousted before the expiration of the term the obligation should remain in force and the obligors should pay the obligee the sum of $2,500 as liquidated damages. The sum named is also the penalty of the bond. It is not expressed, but it is implied that if the sublessee should enjoy his term undisturbed the obliga-

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tion should be void. The bond was dated August 17, 1894. The lease would have expired in July, 1898. It was terminated in July, 1897, and the plaintiff, finding that he would be recognized by the owner only as a monthly tenant, gave notice, and left the premises on October 22, 1897. The case is before us on a single exception taken by the plaintiff to a ruling by the judge who tried the case that the sum named in this condition was a penalty and not liquidated damages.

There is no doubt that a sum which is to be paid upon the breach of a primary undertaking may be treated as a penalty in some cases, notwithstanding the fact that it is called liquidated damages in the contract. The typical case is where it secures several promises of varying importance, one or more of which is for the payment of a much smaller sum of money. *Fisk* v. *Gray*, 11 Allen, 132. *Wallis* v. *Smith*, 21 Ch. D. 243, 257, 268, 275. But we heartily agree with the Court of Appeals in England that so far as precedent permits the proper course is to enforce contracts according to their plain meaning and not to undertake to be wiser than the parties, and therefore that in general when parties say that a sum is payable as liquidated damages they will be taken to mean what they say and will be held to their word. *Wallis* v. *Smith*, 21 Ch. D. 243. *Atkyns* v. *Kinnier*, 4 Exch. 776, 783. In the language of Baron Parke in the case last cited, "If there be a contract consisting of one or more stipulations, the breach of which cannot be measured," as in theory of law the damage caused by a failure to pay money can be, "then the parties must be taken to have meant that the sum agreed on was to be liquidated damages and not a penalty."

In the present case, the stipulation was of the class described by Baron Parke, and in substance it was only one, an additional reason for taking the contract literally. It is true that at first sight it looks as if the damage contemplated as resulting from a breach would vary very much in importance according to the time when the breach occurred. But that is not enough to change the construction of the document, and the variation will seem less striking if it be considered that probably what was intended to be provided against was the loss of the plaintiff's stand and the general inconvenience of moving, or of risking a stay upon an uncertain tenure. It is true that if the plaintiff

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remained in until the end of the term he took his chance of being able to remain longer, but it was a chance unimpaired and likely to be favorable. If the term was forfeited, he was more likely to go out with his lessor, and if he was ousted, that was an end of the matter. The small verdict in the present case does not give any disturbing proof that the real damage was small, because the plaintiff probably relied upon his claim for the whole sum stipulated and put in no evidence of actual damage. The fact that the instrument was in the form of a bond (although repeating the sum to be paid in the condition, see *Mercer* v. *Irving*, El. Bl. & El. 563,) makes no change in the result. *Leary* v. *Laflin*, 101 Mass. 334.

Exceptions sustained.

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SUPPLEMENT.

Opinion of the Justices to the Senate.

The General Court has the right to appropriate money to pay to the widow, heirs, or legal representatives of a person who died while holding an office, the salary of which is payable from the treasury of the Commonwealth or from the treasury of a county, city, or town, the salary, for any period of time after such decease, to which such person would have been entitled if living and continuing to hold such office, if it fairly can be thought that the public good will be served by the grant of such an unstipulated reward, but it has not that right where the only public advantage is such as may be incident and collateral to the relief of a private citizen; and it has the right to authorize a county, city, or town to appropriate money to pay to the widow, heirs, or legal representatives of a person who died while holding an office, the salary of which is payable from the treasury of such county, city, or town, the salary, for any period of time after such decease, to which such person would have been entitled if living and continuing to hold such office, assuming that if the General Court should confer such a power in any case it would so far specify the object and occasion as to adjudicate that they were sufficient to warrant an expenditure for the public good.

On May 22, 1900, the following order was adopted by the Senate and was transmitted on the following day to the Justices of the Supreme Judicial Court, who, on June 5, 1900, returned the answer which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required by the Senate upon the following important questions of law:

1. Has the General Court the right to appropriate money to pay to the widow, heirs or legal representatives of a person who died while holding an office, the salary of which is payable from the treasury of the Commonwealth or from the treasury of a county, city or town, the salary, for any period of time after such decease, to which such person would have been entitled if living and continuing to hold such office?

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2. Has the General Court the right to authorize a county, city or town to appropriate money to pay to the widow, heirs or legal representatives of a person who died while holding an office, the salary of which is payable from the treasury of such county, city or town, the salary, for any period of time after such decease, to which such person would have been entitled if living and continuing to hold such office?

The undersigned, Justices of the Supreme Judicial Court, having considered the questions proposed by the Honorable Senate, by its order of May 22, 1900, a copy of which is annexed, respectfully submit the following opinion.

The questions, as we understand them, both assume that there was no provision of law in existence before the death of the officer by which the money in question would be payable as supposed. If such a provision should be enacted with regard to the widow, heirs, or legal representatives of a living officer, it naturally would be regarded as pledging the faith of the State to the officer himself, and thus as constituting part of the consideration for his future service. We understand the questions to refer to payments which technically are pure gratuities. We also understand them to refer to payments of money raised by taxation in the ordinary way.

In general the power to pay gratuities to individuals is denied to the Legislature by the Constitution. Ordinarily a gift of money to an individual would be an appropriation of public funds to private uses which could not be justified by law. *Mead* v. *Acton*, 139 Mass. 341. *Lowell* v. *Boston*, 111 Mass. 454. *Freeland* v. *Hastings*, 10 Allen, 570. *Loan Association* v. *Topeka*, 20 Wall. 655. *Parkersburg* v. *Brown*, 106 U. S. 487, 500, 501. *Cole* v. *La Grange*, 113 U. S. 1, and cases cited there and in *Kingman* v. *Brockton*, 153 Mass. 255, 259. Cooley, Const. Lim. (6th ed.) 601, 602. We deem this proposition so plain that we do not delay to enforce it, but it is not a proposition which disposes of the questions before us. For it is hardly less clear that when a public purpose can be carried out or helped by spending public money, the power of the Legislature is not curtailed or destroyed by the fact that the money is paid to private persons who had no previous claim to it of any kind.

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We need not illustrate by cases where the payment is made on the footing that there would have been an obligation had not one party been the sovereign power, and where the public advantage is in the manifestation that the sovereign power is just. We will take a case which is in the strictest sense a gift. A conspicuous example which occurs to every one is the granting of military pensions after a war. The soldiers have been paid all to which they are entitled, yet the State may grant them a partial or total support for disabilities contracted in service. Such a gift may be intended primarily for an object which is no more private than is a memorial hall. *Kingman* v. *Brockton*, 153 Mass. 255, 256. It may be meant to bring home to all minds by visible facts that now, as of old, the courage of the battlefield is honored, and that if a man will risk his life for his country, his country afterwards will not necessarily hold him to the letter of his generous bond and deem him fully paid at thirteen dollars a month.

In the language of the Supreme Court of the United States, the "power to grant pensions is not controverted, nor can it well be, as it was exercised by the States and by the Continental Congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the government under the present constitution, and has been continued without interruption or question to the present time." *United States* v. *Hall*, 98 U. S. 343, 346. See *Frisbie* v. *United States*, 157 U. S. 160, 166; *Kellogg* v. *Waite*, 12 Allen, 529, 530.

If the power of Congress is unquestioned, that of the State legislatures under their broader authority is still less questionable, subject to some inquiry as to what would be legitimate occasions for exercising it, for which we need not stop. On January 16, 1781, it was resolved that there be allowed and paid to the non-commissioned officers and soldiers "who were engaged to serve during the war on or before the second day of December last, the sum of twenty-four dollars in silver or gold equivalent thereto as a gratuity . . . as a testimony of the sense this Commonwealth entertains of their faithful services." Resolves, 1780, January session, c. 9. See c. 39 and c. 240. There were many special resolves of the same kind. So far as we have seen expressions of opinion by the courts of other States, they agree

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with what we have quoted from the Supreme Court of the United States, and with what is to be inferred from the practice of our own Legislature within four months of the time when the Constitution had come into force. *Booth* v. *Woodbury*, 32 Conn. 118, 128. *Speer* v. *Blairsville*, 50 Penn. St. 150, 162. *Durach's appeal*, 62 Penn. St. 491, 494. *Brodhead* v. *Milwaukee*, 19 Wis. 624, 652. See also Cooley, Taxation, (2d ed.) 111; 1 Hare, Am. Const. Law, 387.

If further justification for the power to grant military pensions be needed, Article 6 of the Bill of Rights recognizes that advantages distinct from those of the community may be conferred upon the consideration of services rendered to the public. And although in *Brown* v. *Russell*, 166 Mass. 14, 22, 23, it was intimated as the prevailing view of the court that, so far as these words were applicable to the filling of public offices, they must be taken to refer to services to be rendered, that conclusion was drawn from the dependence of the advantages upon the office, not from a general construction of the words. That the words include past as well as future services is shown by the authorities and facts to which we have referred, and perhaps is indicated by the mention of rewards and immunities in chapter 5, section 2, of the second part of the Constitution.

The power to give rewards after the event for conspicuous public service, if it exists at all, cannot be limited to military service. If a man has deserved greatly of the Commonwealth by civil services, the public advantage of recognizing his merit may stand on ground as strong as that for rewarding a general. We cannot foresee the possibilities of genius or distinguished worth and settle in advance the tariff at which its action shall be paid.

It will be plain from what we have said that in our opinion the public welfare alone must be the ground, as it is the only legal justification, for this kind of payment. And it follows that our answer to the first of the two questions before us is that the General Court has the right to appropriate money for the purposes supposed in a case where it fairly can be thought that the public good will be served by the grant of such an unstipulated reward, but that it has not that right where the only public advantage is such as may be incident and collateral to the relief

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of a private citizen. To a great extent the distinction must be left to the conscience of the Legislature. Whether a judicial remedy could be found if a clear case should arise of an unconstitutional appropriation, it happily is unnecessary to inquire.

We make no different answer to the second question, and have not found it necessary to consider distinctions between what the Legislature can do, as representing the sovereign power, and what it can authorize counties, cities, or towns to do; we assume that if the General Court should confer such a power in any case it would so far specify the object and occasion as to adjudicate that they were sufficient to warrant an expenditure for the public good. The ground of decision in *Mead* v. *Acton*, 139 Mass. 341, which certainly went very far, was not a distinction between the direct and indirect action of the Legislature, but was that, because the war had been over so long, it was manifest that the public welfare could not be promoted by the payment of the proposed bounties, and therefore a statute attempting to authorize such a payment by any one attempted to divert public funds to private uses and was void. Possibly other reasons could have been invoked. Some of the language used in that case and in *Kingman* v. *Brockton*, 153 Mass. 255, may need qualification. It goes beyond the point which the court was called upon to decide.

OLIVER WENDELL HOLMES.
MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.
JAMES M. BARKER.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.

Boston, June 5, 1900.

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INDEX.

ABATEMENT.

See AGREED FACTS; APPEAL, 5, 6; TAX, 3, 8; TRIAL, 14.

ABSENT DEFENDANT.

1. Foreign corporations are within Pub. Sts. c. 164, §§ 2, 4, providing that the plaintiff in an action, who is not an inhabitant of or cannot be found within the Commonwealth, shall be held to answer to a cross action by the defendant, if the demands in the two cases are such that the judgments or executions can be set off against each other and that the writ in such cross action may be served on the person who appears as the attorney of the plaintiff in the original suit; and such provisions are constitutional. *Aldrich* v. *Blatchford*, 369.
2. That the cause of action in a cross action brought against a non-inhabitant under Pub. Sts. c. 164, § 2, was for unliquidated damages does not make the judgment recovered therein any the less proper for set-off against the judgment in the original action. *Ibid.*
3. The refusal of the Superior Court to order a continuance under Pub. Sts. c. 164, § 5, of the original action brought by a non-inhabitant, where a cross action has been brought, is not an adjudication that the judgment when reached will not be proper to be set off, under § 2. *Ibid.*
4. The fact that the claim in the original action brought by a non-inhabitant, where a cross action has been brought under Pub. Sts. c. 164, § 2, has been satisfied since the service of the writ in the cross action cannot affect the jurisdiction after it has attached. *Ibid.*
5. It is not necessary that the writ in a cross action brought against a non-inhabitant under Pub. Sts. c. 164, § 2, should be served over again after an amendment showing that the mode of service adopted was justified by the facts. *Ibid.*

ACCEPTANCE.

See COVENANT.

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ACCOUNT.

See PROBATE COURT, 2.

ACTION.

1. An action may be maintained against the members of a partnership on a promissory note signed by one member and indorsed by him in the firm name, given in renewal of a note delivered to carry out a contract whereby the plaintiff made an agreement with the maker of the note who undertook to act for the firm to lend to the firm, and the firm agreed to borrow of him, a certain sum; and the fact that the maker of the note put the money into his own account instead of into that of the firm will not affect the plaintiff's rights, if he was ignorant of it. *Reed* v. *Bacon*, 407.

2. If A. contracts to make for B. certain dies of monuments from drawings or photographs furnished by B., and also, by a separate contract, to manufacture for B. a specified number of folders by printing impressions from the dies, and then contracts with C. to print the folders and also to strike off for A. some extra copies of the folder for the purpose of advertising his own business of making dies, without B.'s knowledge, and C. delivers to B. the whole number of folders printed, A. is precluded, by his fraudulent act in procuring them to be made for his own use, from maintaining an action against B. for the conversion of the extra folders, upon the latter's refusal to deliver them to him. *Levyeau* v. *Clements*, 376.

3. A brakeman in the employ of a railroad corporation, while sitting on the top of a fruit car with his legs hanging over the side, had his head struck by the cornice of a roof over a station platform about one foot and five inches from the line of the nearest rail, and about fourteen and a half feet above the rail, and was injured. He knew that the car was larger than usual, that there was this roof at this place, that there was danger from it, and that he was approaching the place. By his written application for employment he undertook as soon as possible to make a careful examination of all things near the tracks so that he might understand the dangers attending them. *Held*, that he could not maintain an action against the corporation for his injury. *Quinn* v. *New York, New Haven, & Hartford Railroad*, 150.

4. Where, in an action for personal injuries caused by an alleged defective condition of premises which the plaintiff was invited to enter, the evidence is as consistent with the existence of the defect, if there was one, for a few moments only before the accident, as it is with its existence for a longer time, the plaintiff fails to sustain the burden of showing that the defect had existed so long that the defendant in the exercise of reasonable care ought to have known of it and remedied it, and cannot maintain the action. *Toland* v. *Paine Furniture Co.* 476.

5. The front line of a building situated at the corner of A. Street and B. Street, which ran at right angles to each other, in the business section of a town, was set back from each street line. The whole space from the face of the building to the curbing of the sidewalk on each street was covered

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with concrete and presented a uniform appearance, there being nothing to distinguish the part maintained by the town from the part owned and maintained by the owner of the building, and both parts were used openly and freely for public travel. The only exception to the uniformity of appearance was that on B. Street, a short distance from the corner of the building, there being a difference in grade in the concreted area, which terminated abruptly, a retaining wall separating the two grades was built two feet high where it began on the face of the building and ran about seven feet until it met the grade of the sidewalk, where it ended, and it had no fence or guard. A woman, who, on a dark night, had been transacting business at a store in a building owned and controlled by the defendant, the entrance to which was on A. Street, and who was unfamiliar with the premises, after leaving the building, proceeded along the concreted area on A. Street to the corner, and then round the corner on the concreted area on B. Street, stepped over the wall at a point about six feet from the building and within the part maintained by the owner, and fell, receiving injuries. *Held*, that she could maintain an action against the owner of the building for her injury. *Sears* v. *Merrick*, 25.

See Appeal, 2; Bank; Civil Action; Employers' Liability Act, 1, 2, 4, 7; Estates of Persons Deceased, 3, 6; Highway, 3; Insurance, 1; Libel, 1; Master and Servant, 5, 6, 11, 12; Money Paid, 1; Negligence, 5, 16; School; Stay of Proceedings; Tax, 3; Town, 2; Trial, 14.

ADJOURNMENT.

See Bastardy Process, 1.

ADMINISTRATOR.

In an action for the services of a quartette in singing at a funeral, evidence of one of the plaintiffs, that the defendant called at his house and informed him of the death of a woman who was a member of the defendant's household, and wished the services of the quartette at her funeral at a time and place named, and that the defendant told the witness that the woman left money and the defendant would be the administrator of her estate, will warrant a finding that the defendant, who was appointed such administrator, reasonably was understood to contract in his private capacity. *Hunting* v. *Ward*, 223.

See Employers' Liability Act, 2; Equity, 1, 2; Estates of Persons Deceased, 1, 3–6; Forcible Entry and Detainer, 1, 3; Probate Court, 2; Scire Facias.

ADMISSIONS.

See Evidence, 25; Mortgage, 2.

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ADVERSE POSSESSION.

See CONSTITUTIONAL LAW, 3; DEVISE AND LEGACY; FORECLOSURE, 2.

AGENT.

See PRINCIPAL AND AGENT.

AGREED FACTS.

The agreed facts in this case, which was an appeal from a decision on a petition for the abatement of a tax assessed upon the petitioner's property, are not stated with sufficient fulness to enable this court to pass satisfactorily upon the questions involved, and are therefore discharged, and the case is sent back to the Superior Court for another trial. *Phillips Academy* v. *Andover*, 118.

See MONEY PAID, 2.

AMENDMENT.

See ABSENT DEFENDANT, 5; DECLARATION, 3; EMPLOYERS' LIABILITY ACT, 2; MECHANIC'S LIEN, 3.

ANSWER.

See ESTATES OF PERSONS DECEASED, 6; SCIRE FACIAS, 3.

APPEAL.

1. An appeal based simply upon the filing of a "Memorandum of Decision" of a single justice of this court, will not lie to the full bench. *Attorney General* v. *Oliver*, 163.
2. There is no authority by statute or otherwise for an appeal from a single justice of this court to the full court in a common law proceeding. *Ibid.*
3. Where there is a right of appeal from the Probate Court to this court, the matter in controversy should be judicially heard and determined in the court below. *Heard* v. *Trull*, 239.
4. A petition under St. 1895, c. 234, to vacate a judgment of the Superior Court is properly denied, and the judgment must be affirmed, if there is nothing on the record which this court can consider under the appeal. *Holt* v. *Roberts*, 558.
5. It is no bar to the jurisdiction of the court that an appeal to the Superior Court, under St. 1890, c. 127, for an abatement of taxes, was entered less than thirty days after the assessors had given the appellant notice of their decision under § 2, providing that the entry shall be made "at the return day first occurring not less than thirty days after" such notice of the decision; nor that the appeal was not tried at the first trial term, as provided

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in § 4, if the objections are not seasonably taken. *National Bank of Commerce* v. *New Bedford*, 257.

6. A commissioner appointed under St. 1890, c. 127, § 5, upon an appeal to the Superior Court for an abatement of taxes assessed on shares of a national bank, is authorized to find the fair cash value of such shares, and his judgment in matters of fact is not open to revision by this court on exceptions. *Ibid.*

7. Where the record only in a criminal case is before this court on appeal, no question whether the verdict was against the evidence is open. *Commonwealth* v. *Johnson*, 152.

8. If, while a case is pending in a police court, the attorney for the other defendants is appointed guardian *ad litem* to represent the interest of an insane defendant, in the absence of anything appearing to the contrary, it may fairly be assumed that in the proceedings in an appellate court he was acting in the same capacity, so far as the interests of that defendant were involved. *Cunningham* v. *Davis*, 213.

See AGREED FACTS; DECLARATION, 3; LIMITATIONS, STATUTE OF; MANDAMUS; MASTER IN CHANCERY, 1; REDEMPTION; SUPERIOR COURT.

APPEARANCE.

See BASTARDY PROCESS, 2.

ARBITRATION.

See AWARD; INSURANCE, 1.

ARREST.

See POOR DEBTOR.

ASSESSMENT.

See CONSTITUTIONAL LAW, 6; INSURANCE, 3; TAX, 3; TOWN, 1.

ASSESSOR.

See EVERETT; VETERANS' PREFERENCE ACT.

ASSIGNMENT.

On December 24, 1895, A., having lent B. a sum of money, took his promissory note for $100 payable one year after date, to the order of A. with interest thereon payable monthly at the rate of one and a half per cent per month, and at the same rate after maturity, until paid, and also took, as collateral security, an assignment of B.'s interest in the estate of C. deceased, the assignment providing that if B. should pay to A. $100, "with

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interest, as provided in a certain note of this date, in one year from this day, then this assignment and said note shall be void, otherwise of full force and effect." A. brought an action on December 27, 1897, upon the assignment against C.'s executor under St. 1897, c. 402, which relates to actions upon assigned claims. Shortly before A. notified the executor that the note and interest were unpaid and the executor paid A.'s attorney $100, and was informed that $34.50 of interest was due. After this B.'s attorney tendered to A. $7. The executor offered to prove that the amount of the loan was $75, and not $100, and that the tender of $7, together with the $100 paid, equalled the amount of money actually lent, with interest at eighteen per cent per annum, and a sum not exceeding $5 for the expense of making papers. The executor requested rulings, first, that if the jury found in accordance with the offer of proof, the payment and tender would operate as an extinguishment of the debt and a discharge of the assignment and note given as security, and, secondly, that the executor not having been notified of the rate of interest which the note carried, he would be liable for no more than the $100 referred to in the assignment. *Held*, that the first request should have been given, and that the second was rightly refused. *McKie* v. *Gregory*, 505.

See EQUITY, 2, 13; FORECLOSURE, 1; MORTGAGE, 3; PATENT.

ATTACHMENT.

See CONVERSION; STAY OF PROCEEDINGS; TAX, 3; TRIAL, 13.

ATTESTATION.

1. Under St. 1884, c. 330, § 3, requiring a foreign corporation having a place of business in this Commonwealth to file a copy of its charter with the commissioner of corporations, and Pub. Sts. c. 169, § 70, providing that copies of documents in certain departments of the Commonwealth, duly authenticated by the officer having charge of the same, shall be competent evidence in all cases equally with the originals thereof, if the genuineness of his signature is attested by the Secretary of the Commonwealth under its seal, a copy of the copy of a charter so filed with the commissioner, duly authenticated by him, has the same effect as the document in his hands, which is the "original," within the meaning of the statute, and is admissible in evidence. *Commonwealth* v. *Corkery*, 460.
2. Whether the requirement of Pub. Sts. c. 169, § 70, as to the attestation of the genuineness of the signature of a certifying officer by the Secretary of the Commonwealth, is satisfied by an attestation that, at its date, the certifying officer was such officer, "and that to his acts and attestations, as such, full faith and credit are and ought to be given, in and out of court," *quære*. *Ibid.*

ATTORNEY AND CLIENT.

See ESTATES OF PERSONS DECEASED, 5; TOWN, 2.

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AUDITOR.

See EXCEPTIONS, 8.

AWARD.

In this case, which was an action upon an award made under a policy of fire insurance, signed by two only of the arbitrators, the award was not invalidated by the acts of these arbitrators in the absence of the other one, consisting of experiments with articles similar to those insured, a visit to the scene of the fire and examination of the débris, conversations with other persons in relation to the case, talks with each other, and an examination of the books of one of them in regard to prices of goods. *Farrell* v. *German American Ins. Co.* 340.

See INSURANCE, 1.

BANK.

A shareholder, who is a citizen of this State, in a State bank of Washington is bound by the constitution and laws of that State which entered into the contract by which he took his shares; and a receiver of the bank duly appointed and authorized there, may recover in Massachusetts the amount of an assessment laid by the Superior Court of Washington upon the defendant as such shareholder. *Howarth* v. *Lombard*, 570.

See MONEY PAID; SAVINGS BANK; TAX, 7, 8.

BANKRUPTCY.

See STAY OF PROCEEDINGS.

BASTARDY PROCESS.

1. As complaints under the bastardy act, Pub. Sts. c. 85, are now civil suits, the provisions of Pub. Sts. c. 212, § 26, as to the adjournment of trials in criminal cases, do not apply to them, and there seems to be no good reason why they may not be continued as other civil causes. *Conefy* v. *Holland*, 469.
2. If, in a bastardy case, a supplemental complaint is filed in the Superior Court, it is too late, after a general appearance for the defendant in that court, to object either to irregularities in the lower court or to the jurisdiction of that court. *Ibid.*
3. It is no defence to a complaint under the bastardy act that the plaintiff, who is a minor, has brought the proceedings in her own name and not by her next friend. *Ibid.*

BENEFICIARY ASSOCIATION.

See TRUSTEE PROCESS.

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BETS.

See PUBLIC POLICY.

BOARD OF HEALTH.

See WRIT OF ENTRY, 2.

BOND.

1. A bond, after reciting that the obligor had been chosen by the association as treasurer, and as such would receive the property of the association and was bound to keep accurate accounts of money in his hands and to be received by him as treasurer, declared that if he "shall well and truly perform and singular the duties of treasurer of said association for and during the term for which he has been elected and during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office, or to such other person or persons as said association or its authorized officers may direct according to the provisions of the constitution, by-laws, rules and regulations of said association now existing or which may be by said association adopted, then this obligation shall be void; otherwise to be and remain in full force." The election was for one year, and by the by-laws the office of treasurer was an annual one. At the time the bond was given, the obligor was holding office under his first election. *Held*, in an action on the bond, that the phrase "during such further time as he may continue to hold said office" must be held to apply to such further time beyond the term of one year as the principal might hold the office by virtue of his first election, and that it was not intended to cover the time under which he might hold office under any subsequent election. *O'Brien* v. *Murphy*, 253.
2. A lessee gave a bond to his sublessee conditioned that, if through the acts of the former the lease should be terminated or the sublessee ousted before the expiration of the term, the obligation should remain in force and the obligor should pay the obligee the sum of $2,500 as liquidated damages. The sum named was also the penalty of the bond; and it was implied that if the sublessee should enjoy his term undisturbed the obligation should be void. The bond was dated August 17, 1894. The lease would have expired in July, 1898. It was terminated in July, 1897, and the sublessee, finding that he would be recognized by the owner only as a monthly tenant, gave notice and left the premises on October 22, 1897. *Held*, in an action for a breach of the bond, that the sum named was liquidated damages and not a penalty. *Guerin* v. *Stacy*, 595.

See DECLARATION, 5; EQUITY, 4; EVIDENCE, 26; PRINCIPAL AND SURETY; REPLEVIN; STAY OF PROCEEDINGS; TRIAL, 14, 15.

BOSTON.

See BUILDINGS; EMINENT DOMAIN; ICE, 6; MANDAMUS; ORDINANCE.

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BOUNDARY.

See DEVISE AND LEGACY.

BROKER.

1. In an action against the buyer of land for a broker's commission, if the plaintiff's evidence leaves it doubtful whether, while acting for the defendant, he also was employed by A., the owner of the land, to sell it, or simply had an option on the property at a price named, the defendant is entitled to have the jury instructed that "if the plaintiff acted as agent for A., without disclosing the fact that he was such agent to the defendant, he cannot recover a commission from the defendant." *Carpenter* v. *Fisher*, 9.
2. The fact that in an offer by B. for property which A. claims made him B.'s broker B. named the price which he was willing to pay the owner of the property and the sum which he was willing to pay A. is immaterial, in an action by A. against B. for a broker's commission. *Ibid.*
3. If A. is given by B. merely an option on the latter's land at a price named, A., without violating any duty to B., may elect not to exercise such option and undertake the duties incident to acting as a broker for C. in the purchase of the land, and in that event the existence of the prior option is not a material fact which A. in good faith is bound to disclose to C. *Ibid.*

See CONSTITUTIONAL LAW, 7.

BUILDINGS.

A forge in which a fire is maintained for the purpose of carrying on the ordinary business of a blacksmith is not a furnace within the meaning of St. 1892, c. 419, §§ 116, 117. *Boston* v. *Sarni*, 357.

See CONSTITUTIONAL LAW, 5; DEED, 1; MANDAMUS; MECHANIC'S LIEN, 1; NEGLIGENCE, 6.

BURDEN OF PROOF.

See ACTION, 4; EMPLOYERS' LIABILITY ACT, 5; PHYSICIAN, 2.

BY-LAW.

See LIBEL, 2; TOWN, 2.

CERTIFICATE.

See MECHANIC'S LIEN, 3; SCHOOL, 1.

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CHARITY.

See TAX, 5.

CITY.

A city, which has paid a judgment obtained against it in an action for injuries occasioned by a defect in a highway caused by acts and omissions for which a third person was answerable, may recover over against such person, although the city was negligent in failing to keep the way in a safe condition. *Boston* v. *Coon*, 283.

See CONSTITUTIONAL LAW, 4, 5; EMINENT DOMAIN; EVERETT; HIGHWAY, 3–5; ICE, 6; NEW TRIAL; ORDINANCE; TOWN; VETERANS' PREFERENCE ACT.

CIVIL ACTION.

As applied to proceedings upon the civil side of a court, the ordinary meaning of the word "prosecution" includes the institution of a suit, and is not confined to the mere pursuit of a remedy after proceedings have been instituted. *Clinton* v. *Heagney*, 134.

See BASTARDY PROCESS, 1.

COLLATERAL INHERITANCE.

See TAX, 6.

COLLATERAL SECURITY.

See ASSIGNMENT; INSOLVENCY.

COLLECTOR OF TAXES.

See EVIDENCE, 26; PRINCIPAL AND SURETY.

COMMISSIONS.

See BROKER, 1, 2; PRINCIPAL AND AGENT, 2, 3.

COMPLAINT.

1. It is too late to object in the Superior Court that a complaint filed originally in an inferior court is insufficient in form. *Commonwealth* v. *Reid*, 325.
2. A complaint, alleging that, at a time and place named, the defendant "did go from place to place carrying and exposing for sale certain goods, wares, and merchandise, to wit, ice, without then and there having a license from the Secretary of said Commonwealth so to do," describes in

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substance, if not in form, a violation of Pub. Sts. c. 68, § 16, and not a violation of St. 1890, c. 448. *Commonwealth* v. *Reid*, 325.

See BASTARDY PROCESS; EVIDENCE, 5; ICE, 4, 6; PHYSICIAN.

CONDITION.

See COVENANT; DECLARATION, 2; MORTGAGE, 1; WAIVER.

CONFESSION.

It is an answer, in a criminal case, to the question whether it is competent to convict upon an uncorroborated confession, that question being an abstract one, not raised upon the evidence and on which the court was not required to express an opinion, that the undisputed facts were sufficient corroboration. *Commonwealth* v. *Morrissey*, 264.

CONFLICT OF LAWS.

See TAX, 6.

CONSIDERATION.

See DEED, 2; MORTGAGE, 2; PRINCIPAL AND AGENT, 1.

CONSPIRACY.

See EVIDENCE, 14, 15.

CONSTABLE.

See POOR DEBTOR.

CONSTITUTIONAL LAW.

1. The General Court has the right to appropriate money to pay to the widow, heirs, or legal representatives of a person who died while holding an office, the salary of which is payable from the treasury of the Commonwealth or from the treasury of a county, city, or town, the salary, for any period of time after such decease, to which such person would have been entitled if living and continuing to hold such office, if it fairly can be thought that the public good will be served by the grant of such an unstipulated reward, but it has not that right where the only public advantage is such as may be incident and collateral to the relief of a private citizen; and it has the right to authorize a county, city, or town to appropriate money to pay to the widow, heirs, or legal representatives of a person who died while holding an office, the salary of which is payable from the treasury of such county, city, or town, the salary, for any period of time after such decease,

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to which such person would have been entitled if living and continuing to hold such office, assuming that if the General Court should confer such a power in any case it would so far specify the object and occasion as to adjudicate that they were sufficient to warrant an expenditure for the public good. *Opinion of the Justices*, 599.

2. The St. of 1898, c. 562, entitled "An Act to provide for registering and confirming titles to land," is not unconstitutional, in that the original registration deprives all persons except the registered owner of any interest in the land without due process of law, in that it gives judicial powers to the recorder and assistant recorders after the original registration, although not judicial officers under the Constitution, or in that there is no provision for notice before registration of transfers or dealings subsequent to the original registration. LATHROP & LORING, JJ., dissenting. *Tyler* v. *Court of Registration*, 71.
3. The St. 1891, c. 354, providing that "notwithstanding disseisin or adverse possession, any conveyance of real estate otherwise valid shall be as effectual to transfer the title as if the owner of the title were actually seized and possessed of such real estate, and shall vest in the grantee the rights of entry and of action for recovery of the estate incident to such title," is constitutional. *McLoud* v. *Mackie*, 355.
4. The St. 1892, c. 245, providing that the city council of any city except Boston, or a town, with sewers laid out under Pub. Sts. c. 50, §§ 1-3, or with a system of sewerage under § 7, may establish just and equitable annual charges or rents for the use of such sewers, to be paid by every one who enters his sewer into the common sewer, and an ordinance of a city thereunder, charging for "unmetered" water service eight dollars, and for "metered" water service thirty cents per thousand gallons of sewage delivered to the sewer, but no charge to be less than eight dollars subject to certain possible discounts, are constitutional. *Carson* v. *Brockton*, 242.
5. The St. of 1892, c. 270, entitled "An Act relating to the payment for labor performed on buildings or public works owned by cities or towns," is constitutional. *Callahan* v. *Boston*, 201.
6. The St. 1895, c. 186, authorizing any town the population of which exceeds three thousand, which shall adopt the provisions of the act, to appropriate and spend money for watering its public streets, and to assess upon the estates abutting on the streets so watered the whole or any portion of the cost of such watering, is constitutional. *Phillips Academy* v. *Andover*, 118.
7. The Legislature has power to prohibit agents of foreign insurers and brokers from soliciting or acting in regard to foreign insurance, in this Commonwealth, even though they shall agree with the assured that they are his agents. *Commonwealth* v. *Nutting*, 154.

See ABSENT DEFENDANT, 1.

CONTINUANCE.

See ABSENT DEFENDANT, 3; BASTARDY PROCESS, 1; JUDGMENT, 3.

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CONTRACT.

I. *Making.*

See ADMINISTRATOR; COVENANT; EVIDENCE, 1.

II. *Consideration.*

See MORTGAGE, 2; PRINCIPAL AND AGENT, 1.

III. *Validity.*

1. The fact that an alleged antenuptial contract did not contain a schedule of the property to be affected by it, and was not recorded in the registry of deeds, does not affect its validity as between the original parties to it, the requirements of the statutes in regard to schedules and recording being for the protection of creditors. *Walker* v. *Walker*, 349.
2. A written agreement, whereby the subscribers recite their desire to become members of a syndicate to the end that control of a corporation and advantage to them may be gained, agree to take the shares set against their names at a certain price a share, and further agree after the purchase to enter into a pooling contract, whereby all the syndicate stock "shall be voted at each annual meeting for a period of not less than three years, for such board of directors as shall be named" by a committee of five of the subscribers, with power to a majority of them to fill any vacancy in the committee, is lawful. *Brightman* v. *Bates*, 105.

See ESTATES OF PERSONS DECEASED, 5; FRAUDS, STATUTE OF; MASTER AND SERVANT, 2; PLEDGE, 3; PRINCIPAL AND AGENT, 3; PROMISSORY NOTE, 2; PUBLIC POLICY; SAVINGS BANK; WAIVER.

IV. *Construction.*

3. If before A. and B. make a contract for a granite monument, A. sends B. a sample of stock, and in reply B. writes that he has decided to give A. the order for the monument, "the same to be made of first quality white Westerly granite," with further requirements, the order is an order by description, and not by sample, and the sample is not a part of the terms of the contract. *Weston* v. *Barnicoat*, 454.
4. A. submitted to B. a written "proposal and specification," by which A. proposed to furnish B. a refrigerating plant, describing it, and to authorize and permit him to operate it when placed within his premises, and to use A.'s patented system as applied to the plant "free from any royalty over and above the purchase money hereinafter specified to be paid to us during and after the completion of said apparatus." This was followed by a written contract executed by A. and B., by which A. agreed to construct for and deliver to B. on the premises of C. the apparatus made under letters patent owned or controlled by A. for a certain sum to be paid by B. to A. in three instalments, one when the material was delivered on the premises, the second "thirty days after the date on which the plant is ready to do work," and the third sixty days thereafter. *Held*, that A. could not maintain a bill in equity to prevent the use of the

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plant delivered under the contract, until the payments provided for therein had been made. *De La Vergne Co.* v. *Hub Brewing Co.* 419.

See BANK; BOND, 1; COVENANT; TRIAL, 17.

V. *Performance and Breach.*

See ACTION, 1; BOND, 2; DECLARATION, 2; EVIDENCE, 25; NEGLIGENCE, 1; SCHOOL.

VI. *Rescission.*

See ESTATES OF PERSONS DECEASED, 6; MASTER AND SERVANT, 1; MISTAKE.

CONTRIBUTORY NEGLIGENCE.

See ACTION, 3, 4; EMPLOYERS' LIABILITY ACT, 2, 6; MASTER AND SERVANT, 2; NEGLIGENCE, 5, 7, 9–16; TRIAL, 10.

CONVERSION.

In an action against an officer for the conversion of personal property, which either he personally removed or permitted to be removed while he held it under attachment, to a house where the plaintiff had no rights, it appearing that upon two occasions when there was no attachment upon the goods the plaintiff ineffectually demanded a return of them, the defendant is not entitled to a ruling that if "at the dissolution of the attachment the keeper was removed, and the goods were left where they were found when the attachment was made, the defendant is not liable," or that he "was not bound, upon dissolution of the attachment, to do anything more than to remove his keeper and leave the goods where he found them." *Munro* v. *Stowe*, 169.

See ACTION, 2; EVIDENCE, 17–19; INFANT; TRIAL, 13; TRUST AND TRUSTEE, 2.

CONVICTION.

See EVIDENCE, 27.

CORPORATION.

See ABSENT DEFENDANT, 1; ATTESTATION, 1; BANK; BOND, 1; CONTRACT, 2; COVENANT; EQUITY, 4, 10, 11; GRADE CROSSING, 2; ICE, 2, 4, 5; LIBEL; PATENT; PRINCIPAL AND AGENT, 3; RAILROAD; RAILROAD COMMISSIONERS, 2; SAVINGS BANK; TAX, 1, 2, 5, 8.

COSTS.

See JUDGMENT, 1; MECHANIC'S LIEN, 4; TRIAL, 14.

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COURT OF REGISTRATION.

Under St. 1899, c. 131, § 2, the Court of Registration may report a case for the consideration of this court, although no order or decree has been entered, if the case is ripe for judgment or decree, and the report shows that a decree would be entered if it were not for the question of law, and provides for a decree when the doubt upon that question is resolved. *Welsh, petitioner*, 68.

See CONSTITUTIONAL LAW, 2.

COVENANT.

A covenant executed by the defendants and delivered to the plaintiff recited that a certain number of shares of the stock of a corporation had been or were about to be purchased by a syndicate under an agreement of a certain date; that the plaintiff was largely instrumental in organizing the syndicate; and that "he considers that for his services therein in case the syndicate is formed, and the aforesaid shares purchased, he should receive for his compensation" a certain amount of stock. These recitals were followed by several covenants on the part of the defendants and another to give the plaintiff in stock of the corporation at a certain price per share a commission of a certain sum a share "upon the number of shares of said stock we sell to said syndicate, less the number of shares we have severally subscribed as members of said syndicate," and certain other deductions, in case the compensation was not got from the syndicate. *Held*, that the covenant properly might be found, if not ruled, to be made to the plaintiff; that beyond acceptance of the delivery to him no other acceptance or notice of acceptance was necessary; and that the contract was intelligible. *Held, also*, that it could not be said that the judge was not warranted in finding that whatever efforts to get the compensation from the syndicate were necessary before coming on the defendants had been made. *Brightman* v. *Bates*, 105.

CREDITORS.

See CONTRACT, 1; EQUITY, 3; LIBEL, 3; LIMITATIONS, STATUTE OF.

CRIMINAL LAW.

See APPEAL, 7; BASTARDY PROCESS, 1; COMPLAINT; CONFESSION; EVIDENCE, 4, 5, 27; ICE; INDICTMENT; MASTER IN CHANCERY 3; PERJURY; PHYSICIAN; SENTENCE.

CRUELTY.

See DIVORCE.

CUSTOM.

See EVIDENCE, 13, 22.

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DAMAGES.

See Absent Defendant, 2; Bond, 2; Evidence, 9, 20, 21; Grade Crossing, 3; Highway, 2, 3; Judgment, 1; New Trial; Pledge, 1, 3.

DEATH.

See Employers' Liability Act, 1; Insurance, 3; Negligence, 5, 8; Trustee Process.

DECEIT.

See Infant.

DECLARATION.

1. The ground that counts of a declaration are inconsistent with each other is not the same as the ground of misjoinder of counts, and Pub. Sts. c. 167, § 67, do not apply. *Goodhue* v. *Hartford Fire Ins. Co.* 187.
2. The first count of a declaration alleged a written policy of insurance upon goods in a certain place, with a condition against removal, a waiver of the condition, a removal of the goods to another place consented to, and a loss. The second count alleged a "surrender" of the policy at the defendant's request that it might be modified so as to cover the goods in the new place, an agreement to insure until the policy was modified, and a loss before the modification was made. The third count alleged a waiver of the condition against removal and an agreement that "until modification thereof" the policy should attach to the goods until all stored in their new place, and a further agreement thereafter to attach a permanent modification to the policy; and that the policy was delivered to the defendant, which, in violation of its agreement, modified the policy so that it covered a part only of the goods, and thereby cancelled the policy as to the other goods. *Held*, on demurrer, that the counts were not inconsistent. *Ibid.*
3. Upon an appeal from the judgment of the Superior Court on a demurrer to a declaration, this court will not affirm the judgment upon a ground contended for different from that assigned for the judgment, without giving the plaintiff the same opportunity to amend his declaration which he would have had in the Superior Court, if the argument addressed to this court had prevailed there. *Ibid.*
4. It is not necessary that the declaration in an action upon a policy of fire insurance in the standard form should allege that the assent of the defendant to the removal of the insured property was in writing. *Ibid.*
5. A declaration contained four counts, each of which alleged in the opening sentence that the defendant made to the plaintiff "a bond, a copy of which is hereto annexed marked 'A' in" a certain action of replevin. The first and third counts each alleged also that, on a day named, a certain person as principal and the defendant as surety made and delivered to the plain-

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tiff a bond, "a copy of which is hereto annexed marked 'A,' with condition," which had been broken; and the second and fourth counts each contained similar allegations, but described the copy of the bond annexed as marked "B." Annexed to the declaration were copies of two bonds precisely alike and marked respectively "A" and "B." *Held*, that the declaration contained counts on both bonds. *McManus* v. *Donohoe*, 308.

See VARIANCE; WAIVER.

DECREE.

See COURT OF REGISTRATION; EQUITY, 14; ESTATES OF PERSONS DECEASED, 6; LIMITATIONS, STATUTE OF; NULLITY OF MARRIAGE; REDEMPTION.

DEED.

1. A deed contained the restrictions, "that the said grantee or his heirs or assigns shall not for a period of ten years erect on the granted premises any buildings or parts thereof which shall be used or occupied for any other purposes than dwelling-houses, and private stables, and buildings usually appurtenant to dwelling-houses, except the corner lots, which may be used for store purposes, and said dwellings to be occupied by none but respectable families, and that no building, or part of any shall be erected within fifteen feet of the front line of each lot, and that no dwelling-house shall be erected thereon to cost less than" a sum named. *Held*, that the words "for a period of ten years" governed the entire clause. *Welsh, petitioner*, 68.
2. If a street is laid out by an order of the street commissioners of a city over certain land as a public way, and several months afterwards the owner conveys the land in fee to the city by a deed which recites that the land was taken by the order to lay out the way, and that the consideration of the deed was in full satisfaction and discharge of all claims and demands by reason of such taking, the fee does not pass from the owner until the delivery of the deed, and he is not estopped by anything therein to assert that fact as against a tenant of the premises who remains in occupation until such conveyance. *Devine* v. *Lord*, 384.
3. If the equity of redemption in mortgaged premises is levied upon, and afterwards the mortgagor purchases the premises at a sale under a power in the mortgage, the deed to him operates as a conveyance of the title and not as a discharge or release of the mortgage, and a deed of the officer who subsequently sells the equity of redemption previously levied upon is of no effect. *Lunt* v. *Cook*, 1.

See EVIDENCE, 28; MECHANIC'S LIEN, 3; WRIT OF ENTRY, 2.

DEFAULT.

See JUDGMENT, 2, 3.

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DELIVERY.

See DEED, 2; WAIVER.

DEMURRER.

See DECLARATION, 2; EQUITY, 11, 12.

DEPOSITION.

The Superior Court has no jurisdiction of a petition, brought by the parties and not by the magistrate, to compel the giving of testimony under Sts. 1883, c. 195, and 1898, c. 374. *First National Bank of Chicago* v. *Graham*, 179.

DEVISE AND LEGACY.

A., by his will, devised to B. for life the dwelling-house occupied by B., together with the land on which it stood, the lines of which were described; and also devised his own adjacent dwelling-house and the land on which it stood, after his wife's death, to his grandson, C. A walk constructed of artificial stone ran from the street along the northerly side of B.'s house to a side door and to the back part of the house, in such a position that the boundary line of his lot as described in the will ran longitudinally through the walk, one foot in width of the stone being on B.'s side of the line and two feet on C.'s side. There was also a paved driveway leading back from the street to a barn on C.'s property in such a position that the northerly side of the driveway was twenty-six feet distant from the line described in the will. B.'s house was built by A., who was his father-in-law, and had been occupied ever since by B. and his family. A walk was constructed from this house through the grounds to A.'s dwelling-house on the adjacent lot. The driveway was used occasionally by B., and he and A. and their families passed back and forth in daily intercourse between the houses. The portion of the grounds between B.'s house and the driveway was occupied by him. A. paid the taxes on B.'s house and lot, the house was insured in A.'s name, a man in his employ was accustomed to mow the grass on both lots, and there was nothing before A.'s death to indicate that B. made any adverse claim to the property. *Held*, on a bill in equity by B. against C., that B. had not acquired by prescription any rights in the land northerly of the boundary described in the will; and that there was no such connection shown between the driveway and B.'s house, or between his house and the land between the stone walk and the driveway as to create an easement in favor of his lot. *Prescott* v. *Prescott*, 64.

See TRUST AND TRUSTEE, 1.

DISCHARGE.

See ASSIGNMENT; DEED, 3; MASTER AND SERVANT, 1; MORTGAGE, 3; PRINCIPAL AND SURETY.

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DISCONTINUANCE.

See FORCIBLE ENTRY AND DETAINER, 2; JUDGMENT, 2.

DISCOVERY.

See EQUITY, 12.

DISSEISIN.

See CONSTITUTIONAL LAW, 3.

DISTRIBUTION.

See MECHANIC'S LIEN, 6; TRUST AND TRUSTEE, 1, 2.

DIVORCE.

At the trial of a libel for divorce for cruel and abusive treatment within the meaning of Pub. Sts. c. 146, § 1, it appeared that the libellee failed to stay at home and take care of her husband or to consent to his hiring a nurse or housekeeper so to do, threatening to leave him if he did hire one, that he was not dependent solely upon his wife, that he was under the care of a physician and had the money with which to procure nursing and proper food, which food he did in fact procure when he got up from his sick bed by boarding with the occupants of another tenement in the same house, and that he afterwards went away in search of health. There was no pretence that the hiring of a nurse could not have been done through the physician. *Held*, that under these circumstances the fact that the libellant's health was temporarily injured by the libellee's failure to comply with the doctor's orders as to the libellant's diet and medicines was not sufficient. *Bonney* v. *Bonney*, 7.

See NULLITY OF MARRIAGE.

DUE CARE.

See ACTION, 3, 4; EMPLOYERS' LIABILITY ACT, 2, 6; MASTER AND SERVANT, 2; NEGLIGENCE, 5, 7, 9–16; TRIAL, 10.

EASEMENT.

See DEVISE AND LEGACY; EMINENT DOMAIN.

ELECTION.

See BROKER, 3; TRIAL, 14.

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ELECTRICITY.

See NEGLIGENCE, 2, 16.

EMINENT DOMAIN.

The street commissioners of Boston ordered that a certain highway be widened and laid out under the provisions of statutes named, including St. 1897, c. 394, over certain streets and private lands described from one park to another park as a public way; and that, under the authority conferred by St. 1894, c. 324, certain parts of the way be reserved for the use of street railways, and for trees, grass, and planting; and designated certain described parts of the way to be under the authority of the park commissioners of the city as a parkway, subject to the reservation made under St. 1894, c. 324, as above stated. *Held*, that an easement only, and not the fee, in the lands described was taken under the order. *Devine* v. *Lord*, 384.

See DEED, 2; EVIDENCE, 20, 21; NEW TRIAL; TENANT AT SUFFERANCE.

EMPLOYERS' LIABILITY ACT.

1. If a brakeman is thrown from a slowly moving freight train by a jerk of the train, but by reason of his foot being caught by something on the cars, he is dragged nearly two hundred feet during which he receives but slight bodily injuries, and he is then drawn under the cars, which sever his head from his body, his death is preceded by a period of conscious suffering which cannot be separated from the instant in which he is killed so as to enable his next of kin to maintain an action for his instantaneous death under St. 1887, c. 270, § 2. *Martin* v. *Boston & Maine Railroad*, 502.
2. A brakeman while descending a ladder at the end of the car at the head or rear end of the freight train, which was being slowly backed by a shifting engine, was thrown to the ground by a jerk of the train, his foot was caught by something on the car so that he was dragged some distance, and then, although the stop signal was given at once and the brakes applied, he was drawn under the cars and killed. *Held*, in the absence of evidence that he was in the exercise of due care, that the train was under-manned, that the cars or track were defective or that those in charge of the train were guilty of negligence, an action could not be maintained by his next of kin under St. 1887, c. 270, § 2. *Held*, *also*, that, if an amendment of the action were authorized, the result would be the same should the action be amended by making his administrator the the party plaintiff under St. 1887, c. 270, § 1. *Ibid.*
3. In an action under the employers' liability act, St. 1887, c. 270, for personal injuries, the jury are rightly instructed that the plaintiff was

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not excused from giving the notice required by § 3 of that statute, as amended by St. 1888, c. 155, § 1, unless he was both mentally and physically disabled. *Cogan* v. *Burnham*, 391.

4. An action cannot be maintained at common law for personal injuries sustained by the plaintiff while engaged, with others employed by the defendant, in taking down a coal run composed of a series of trestles about twenty feet high, having uprights and top and cross pieces of heavy timbers, the base resting upon the ground, and fastened together at the top by stringers on which two thicknesses of heavy planking were laid crosswise and spiked down, if the accident, which happened when the first trestle was being lowered to the ground, was caused primarily by the fellow workmen of the plaintiff negligently taking down the trestle as a whole, instead of separating it and taking it down in sections. *Ibid.*
5. If in lowering so large a structure a heavy piece of timber should have been planted in the ground to hold the end of the rope by which the structure was lowered, the burden is on the plaintiff to prove that no such piece of timber was on the premises. Since the necessity for such a piece of timber arises from a temporary condition during the progress of the work caused by the negligence of fellow workmen in the way in which they lowered the structure, the defendant does not owe the plaintiff any duty to provide for it. *Ibid.*
6. In this case, which was an action under the employers' liability act, St. 1887, c. 270, for personal injuries alleged to have been caused by the negligence of a person in the defendant's service intrusted with and exercising superintendence, the evidence warranted a finding that he was acting as superintendent with the authority and consent of the defendant when the latter was not present, in the directions which he gave to the plaintiff with reference to the work that he was doing at the time of the accident, and that placing a dangerous appliance in the plaintiff's hands with instructions to use it was an act of superintendence, and was negligent; and the questions whether the plaintiff was in the exercise of due care, and whether the accident happened as he contended that it did, were properly submitted to the jury. *McCabe* v. *Shields*, 438.
7. A boy eighteen years old, who had been at work several days, was told to oil, while in motion, a band saw about two and one-half inches in width, having teeth on one edge. He knew that he was to pour the oil into a cup which was on top of one of the feed rolls nearest the saw and a little on one side of the plane in which the saw was moving, about twenty inches above the table and within easy reach of a person standing on the floor. Under the table was another cup, into which he had poured oil several times for the purpose of oiling the saw. When he received the order he was facing the plain edge of the saw. Without passing in front of the saw, as he might have done, he took up the can with his left hand, the saw being between him and the cup, and in carrying the can towards the cup his hand came in contact with the teeth of the saw, and he was injured. Everything was in plain sight, and he knew that the saw was in rapid motion, and that if his hand came in contact with it he would be hurt. *Held*, that he could not maintain an action under the employers'

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liability act, St. 1887, c. 270, for his injury. *Buttle* v. *George G. Page Box Co.* 318.

8. In an action under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff by the fall of a freight elevator which he was employed to run in carrying material in process of manufacture from one department to another in the defendant's mill, the fall being caused by overloading the elevator with a quantity of material, the plaintiff testified, on direct examination, that A., who was the second hand in one of the rooms, told another workman to put the truck containing the material on the elevator, and then said to the plaintiff, "You take that up stairs"; that A. "gave orders to the help"; and that no one in that room "gave orders" to A. On re-cross-examination, he testified, "When the men were there at any time, whether they were second hands, or third hands, or common workmen, and put their load on the elevator, they used to tell where to take the load"; and that "when anybody gave what I call orders with respect to the load or weight, it was to tell where the load was to go and that was all there was of it." *Held*, that the plaintiff's testimony on re-cross-examination must be taken to be an explanation of what he meant by the word "orders" in his direct examination; and that, with this explanation, there was no evidence to warrant a finding that the direction given by A. was an act of superintendence. *Sullivan* v. *Thorndike Co.* 41.

9. It is not obvious to an ordinary man, who is not a mechanic, although he has had an experience of seven years in running such an elevator, and is familiar with its various parts, that if an elevator, which is suspended by two hemp ropes passing in grooves over a drum situated at the top of the well-hole in which it runs, and attached at one of their ends to the cross beam at the top of the elevator, and at the other to two counter weights running up and down behind wooden casings in the side of the well-hole, is overloaded, the ropes will slip in the grooves and the elevator fall; and he does not assume the risk of injury from such an accident. *Ibid.*

See EVIDENCE, 10; MASTER AND SERVANT, 9.

EQUITY.

I. *Jurisdiction and General Principles.*

1. An administrator is not to be enjoined from performing his duties by an equity court on the ground that his appointment ought to be revoked. The remedy is by probate proceedings. *Bennett* v. *Kimball*, 199.

2. A., the owner of a patent, assigned it, together with all his right and title in and to any claims for past infringement thereof, to B., who prosecuted against certain agents of the United States a suit in his own name in the Circuit Court and obtained a decree on the merits ordering an accounting, no question having been raised as to the validity of his title under the assignment. Afterwards A. executed a contract with B. and C., an attorney, to share equally with them the sum realized from the

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prosecution of the claim after deducting all expenses incurred in such prosecution. A. died, and his daughter, who was appointed administratrix of his estate, contracted with B. and C. that if they would continue to prosecute the claim she would transfer the treasury warrant for the payment of the proceeds as soon as it should be issued, to joint trustees to collect the same and make distribution. Subsequently an act of Congress was enacted, authorizing the Secretary of the Treasury to pay to the "legal representatives" of A. a certain sum as "compensation in full for the use by the United States" of the patented invention, "as appears in the findings of law and of facts made by the United States Circuit Court" in the suit above named. B.'s administrator and C. brought a bill in equity against A.'s administratrix to enforce a trust in this money. *Held*, on demurrer, that the bill could be maintained. *Thayer* v. *Pressey*, 225.

3. If a creditor of a mortgagor of land, who has attached the latter's equity of redemption, wishes to protect any interest which he may have in the proceeds remaining in the mortgagee's hands upon a foreclosure sale, he should give due notice to the mortgagee, and he cannot maintain a bill in equity against the mortgagee to recover such proceeds after the latter, without notice of the former's claim, has paid the surplus to the mortgagor or upon his order. *Hardy* v. *Beverly Savings Bank*, 112.

4. A corporation, which executes a mortgage of its property in trust, securing an issue of bonds and providing that the holders of certain debenture bonds previously issued by the corporation may exchange them for the mortgage bonds, cannot maintain a bill in equity to prevent the trustee from making such an exchange of bonds for a bondholder, who has deposited his debenture bonds with the trustee and demanded mortgage bonds therefor, prior to a vote of the corporation withdrawing from the bondholders the privilege of making such an exchange and revoking the authority of the trustee to act. *Wakefield Water Co.* v. *New England Trust Co.* 478.

5. A bill in equity alleged in substance that a cup was held by the defendants under an agreement in the nature of a trust by which it was to be "raced for" on Labor Day of 1896, 1897, and 1898, and "to be delivered by the club holding the same immediately after such a race to the club represented by the bicycle team winning said race, and said cup to become the property of said club represented by the team winning the race" of 1898. The N. Cycle Club, of which the defendants were members, won the cup in the race of 1897, and received the same from the winners of the preceding year, and have ever since held it "upon the trusts" aforesaid. The T. Club, of which the plaintiffs were members, won in the race of 1898, and it became the duty of the N. Club to deliver the cup to the T. Club. *Held*, that the bill sufficiently set forth a trust, and that it was the duty of the N. Club as the trustee holding the cup to deliver it to the T. Club in accordance with the terms of the trust, and that that duty might be enforced under the general jurisdiction in equity. *Wilkinson* v. *Stitt*, 581.

6. The fact that a cup has a value apart from the sixty dollars which it

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cost, arising from its having been put up as a prize in a bicycle race and its having been won by one of the competing clubs, distinguishes this case, which is a bill in equity to compel another club to carry out the trust by virtue of which it holds the cup, from decisions, in which it is held that this court sitting in equity will not entertain jurisdiction of bills involving pecuniary interests of trifling amount. *Wilkinson* v. *Stitt*, 581.

7. The averments of the bill in equity in this case, brought by a husband against his wife to enforce an alleged antenuptial agreement made by her, are not sufficient to entitle the plaintiff to an interest in his wife's estate while they are living apart after a permanent separation. *Walker* v. *Walker*, 349.

See CONTRACT, 4; DEVISE AND LEGACY; MISTAKE; PATENT; PROBATE COURT; RAILROAD COMMISSIONERS; WRIT OF ENTRY, 1.

II. *Pleading and Practice.*

8. A bill in equity brought by some in behalf of all members of a class against some representing all members of another class is considered as brought by all the members of the plaintiff class against all the members of the defendant class, each class being represented by the particular members named in the bill as parties plaintiff and defendant; and it is not a suit which must be brought by an officer or under authority given so to do. The proper allegations as to why all the members of each class are not joined must be made in the bill, and the court must be satisfied at the hearing that those bringing the suit for all the plaintiffs, and those against whom the suit is brought as representing all the defendants, fairly represent the members of the class in question. *Wilkinson* v. *Stitt*, 581.

9. The objection that a bill in equity is multifarious is one upon which there is no inflexible rule, and the question whether the objection shall be sustained must be determined largely by the circumstances of the particular case; and in this case all the matters charged are so related to the general ground of complaint that the objection cannot be sustained. *Bliss* v. *Parks*, 539.

10. The general ground of complaint in a bill in equity by the receivers of a corporation that the defendants, as officers in charge of the business of the corporation, mismanaged it for their personal gain, is a ground for equitable relief. *Ibid.*

11. While there are in this bill in equity, by the receivers of a corporation, some matters which are pleaded argumentatively and are not plainly and directly charged, as, for instance, some statements that officers of the association, and the defendants "conspiring to defraud," or "conspiring to appropriate unlawfully," or "further conspiring to defraud," did certain acts, in the main allegations are plain and direct, and are not open to the objection that they are argumentatively stated; and this ground of demurrer being addressed to the bill as a whole is unsound and must be overruled. *Ibid.*

12. A demurrer to a bill in equity on the ground that it seeks discovery of

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matters within the knowledge of the plaintiff must be overruled, if it does not appear from the bill that the matters concerning which discovery is sought are within the knowledge of the plaintiff. *Bliss* v. *Parks*, 539.

13. In a bill in equity, by the assignee of a patent and of all right and title in and to any claims for past infringement thereof, to enforce a trust in a sum of money directed by a statute of the United States to be paid for such infringement, it is not necessary to annex a copy of the assignment nor to state the substance of its provisions in detail, but it is sufficient if the plaintiff states that he is the owner of an assignment in writing from the patentee of all his right, title, and interest in and to any and all claims for past infringement, and shows that the fund was appropriated by Congress as compensation for an infringement of the patent. *Thayer* v. *Pressey*, 225.

14. After an exception has been taken to an order dismissing a bill in equity, and before the expiration of the time for filing a bill of exceptions, a formal final decree properly cannot be entered, but the case should be left open upon the order for a final decree until the time for filing a bill of exceptions has passed, or until the decision of the question of law raised by the exception. *Prescott* v. *Prescott*, 64.

See ESTATES OF PERSONS DECEASED, 6; MASTER IN CHANCERY; REDEMPTION; TRUST AND TRUSTEE, 4.

ERROR.

See WRIT OF ERROR.

ESTATES OF PERSONS DECEASED.

1. Section 1 of Pub. Sts. c. 133, as to persons suspected of having fraudulently received, conveyed, etc., any estate of a deceased person relates to fraudulent conveyances of real estate, and the administrator and the estate are in such circumstances as to give him a right to make the complaint under the statute, where the estate has been represented insolvent, and there is an allegation that a sale of the testator's real estate is necessary for the payment of debts. *Dickey* v. *Taft*, 4.

2. The St. of 1896, c. 445, entitled "An Act relative to evidence in actions against the estates of deceased persons," does not repeal the law as it previously stood as to private conversations between husband and wife. *Hyde* v. *Gannett*, 177.

3. The St. 1896, c. 445, relative to evidence in an action against the personal representative of a deceased person, in which the cause of action is supported by oral testimony of a promise or statement made by the deceased person, is not restricted to actions begun after the decease, but applies to an action begun during the lifetime of the deceased, and in which, after his death, the administrator of his estate appears and takes upon himself its defence. *Brooks* v. *Holden*, 137.

4. The St. 1898, c. 535, relative to the declarations of deceased persons,

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does not limit the operation of St. 1896, c. 445, relative to evidence in actions against the representatives of deceased persons. *Brooks* v. *Holden*, 137.

5. The personal representative of a deceased client may exercise in favor of the client's estate the right to waive the privilege which the client had in his lifetime for his own benefit, and may call upon the latter's attorney to disclose as a witness communications made to him by the client. *Ibid.*

6. A decree, dismissing a suit in equity brought by the heirs of a deceased person to set aside a contract made by him, on the grounds of insanity and fraud, to which suit the administrator of his estate is not a party, is not an adjudication which will bind the administrator, in an action against him upon such contract, the defences to which are insanity and fraud; and the pendency at that time of the suit in equity is not a material fact to be alleged in the answer to the action, and the allegation cannot affect in any way the defendant's rights. *Forbes* v. *Douglass*, 191.

See ADMINISTRATOR; ASSIGNMENT; LIMITATIONS, STATUTE OF.

ESTOPPEL.

See DEED, 2; SAVINGS BANK; TAX, 8.

EVERETT.

The removal by the mayor of the city of Everett of a person from the office of assessor for "the good of the service," is valid under the charter of that city. *Ayers* v. *Hatch*, 489.

See VETERANS' PREFERENCE ACT.

EVIDENCE.

1. If, in an action on a promissory note given for money lent by the payee to the maker, the evidence shows that A. acted as the go-between in making the contract, it is competent for him to testify to the agreement made through him, and it is immaterial whether he was anybody's agent, and, if so, whose. *Reed* v. *Bacon*, 407.

2. Evidence of the person who negotiated a loan of money for which a promissory note was given, as to the statements made to him by the borrower, and of the lender as to the former's statements to him in relation to the matter, is admissible in an action on the note. *Ibid.*

3. At the trial of a writ of entry evidence of a conversation on the demanded premises between the daughter of the demandant sent by him to collect the rent and the husband of the tenant, acting as her agent, in which he told her that she had no right to be on the premises or to collect the rents, is admissible for the purpose of showing the possession of the tenant. *Barker* v. *Mackay*, 485.

4. Evidence that, about three months before stolen milk cans were found in the defendant's possession under suspicious circumstances, he said to a

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fellow servant that if the latter was short of cans he could go out and steal them, and that if he did not do it there were others that could do it, is admissible at the trial of an indictment for the larceny of the cans. *Commonwealth* v. *Corkery*, 460.

5. At the trial of a complaint for holding one's self out as a physician and surgeon without being registered according to law, the government having put in testimony to the effect that the defendant had given directions and advice as to the use of the contents of certain packages and bottles sold by him, and had been paid by the persons to whom the contents were sold, testimony offered by him on cross-examination that on each and every occasion at the time the parties were told by him that he was not a doctor and that he did not charge for his services should have been admitted. *Commonwealth* v. *St. Pierre*, 48.
6. A person who, after an accident caused by a collision between a bicycle and a horse and carriage, injuring the rider of the bicycle, followed the occupant of the carriage as he drove rapidly away, may testify, in an action against the latter for the injury, that when he overtook the defendant he told him that he was sent to see who he was, and the defendant refused to give his name; and the witness may testify also that the defendant drove away and did not turn back until requested so to do by him, although this is denied by the defendant. *Jones* v. *Shattuck*, 415.
7. At the trial of an action for injuries occasioned by an alleged defective step evidence offered by the plaintiff of the condition of a step a month before and a week after the accident, in the absence of evidence that its condition then and at the time of the accident was the same, was properly excluded; and if, after the introduction of evidence that the condition of the step during that period remained unchanged, the offer was not renewed, the plaintiff had no ground of exception. *Powers* v. *Boston & Maine Railroad*, 466.
8. At the trial of an action for injuries occasioned by an alleged defective step on the side of a locomotive engine the testimony of a master mechanic employed by the defendant as to the condition of the step on the day of the accident was plainly admissible. *Ibid.*
9. In an action for personal injuries the defendant offered to show, as affecting the damages only, that prior and up to the time of the accident the plaintiff had been addicted to the excessive use of intoxicating liquors, but the judge excluded the evidence and allowed the defendant to offer evidence that since the time of the injury the plaintiff had been addicted to the use of intoxicating liquors. *Held*, that the evidence rejected was rightly rejected. *Sullivan* v. *Marin*, 422.
10. In an action under the employers' liability act, St. 1887, c. 270, for personal injuries alleged to have been caused by the negligence of A., a person in the defendant's service intrusted with and exercising superintendence, evidence of a workman in the defendant's shop, as to acts of A. in putting people out of the shop and his language at the time he did it, is admissible as bearing upon A.'s conduct in the shop in matters of control. *McCabe* v. *Shields*, 438.
11. In an action for personal injuries sustained while working on a certain

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machine where the above facts were disclosed, the question whether a person who formerly worked on the machine did or did not do something for the purpose of making it safer when using it, is immaterial and properly excluded. *Smith* v. *Beaudry*, 286.

12. In an action for personal injuries against a street railway company, it appeared that when the plaintiff, who was driving, was overtaken by the defendant's car which was going in the same direction, the horse took fright and dashed the wagon against a tree and the plaintiff was thrown to the ground. The plaintiff, who contended that the car was running at an excessive rate of speed, and that the motorman, knowing that the horse was frightened, negligently sounded the gong and failed to diminish the speed of the car, offered the evidence of the owner of the horse as to the capacity of speed of the horse to show that the horse was a speedy animal. *Held*, that the evidence had no tendency to show at what rate of speed the car or even the horse was going at the time of the accident, and that it was rightly rejected. *Spargo* v. *West End Street Railway*, 174.

13. In an action for personal injuries, occasioned to the plaintiff by being thrown from an electric car by reason of its coming into collision with the rear end of another car, it appeared that the place of the accident was away from the highway, on a track running down from a mountain, through fields and woods, by a series of curves, and on a steep grade to a certain street, and that the cars ran rapidly, and the first car was followed by the second after an interval of only two minutes. The defendant offered to show that it was not customary for the motorman to leave his post at the front of the car and go back to give warning to any approaching car of the position of the car ahead, or of the conductor to give him any such directions. *Held*, that the evidence was rightly excluded. *Blanchette* v. *Holyoke Street Railway*, 51.

14. In an action for personal injuries occasioned to a minor, the extent thereof being in dispute, declarations of the mother tending to show that the plaintiff was not so ill as represented are not admissible to bind the plaintiff without proof of conspiracy; and the fact that the mother kept the outside door of the house locked may well be regarded as immaterial, even if it were done with the knowledge of the plaintiff. *Ibid.*

15. In an action for personal injuries occasioned to a minor, the extent thereof being in dispute, it appeared that the plaintiff's mother and another daughter, E., had some talk in the presence of the witness about cutting out a dress pattern, and the mother said that she could not do it and she would go into the plaintiff's room; that the mother and E. went into the room, and in a short time came out with the pattern cut out properly. *Held*, that there was no direct evidence that the plaintiff did in fact cut out the dress pattern, and the evidence offered might well be considered by the judge as showing only that the plaintiff's advice was sought, and not manual labor on her part. *Ibid.*

16. At the trial of an action for personal injuries occasioned by the fall of an elevator, the cause of its fall is a proper subject for expert testimony, and the questions put to the witness in this case were competent. *Sullivan* v. *Thorndike Co.* 41.

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17. Upon the facts of this case, which was an action for the conversion of a quantity of furniture in a lodging-house, the witnesses properly were allowed to testify to its value as a whole. *Munro* v. *Stowe*, 169.

18. The declarations and conduct of the witness, in an action for the conversion of personal property, when trying to sell the property, which tend to contradict his testimony in regard to its value, are competent. *Ibid.*

19. In an action for the conversion of a lounge, evidence having been introduced as to its construction and age, a witness who has qualified as an expert may, to the question, "What would be the fair market value of that sofa in July, 1897?" answer, "To anybody that liked antique furniture it was worth fifty dollars, but if it was sold at auction, or to a person who did n't care for antique furniture, it would be probably from fifteen dollars to twenty dollars." *Bradley* v. *Hooker*, 142.

20. Where it is sought to prove the damage to property sustained by reason of a taking of the right to maintain a public sewer through it, if it appears that the land is by nature adapted for a site for dye-works or a print-mill, it is proper to allow evidence to be given as to its value for such purposes, though the land is not then used therefor, by a person who has been shown to be qualified to testify to such value by knowledge thereof derived from experience in that business; but testimony of this kind is to be admitted only when it is impossible otherwise to prove the value of the property in question. *Cochrane* v. *Commonwealth*, 299.

21. At the trial of a petition to recover damages sustained by reason of a taking under the Metropolitan Sewer Act, St. 1895, c. 406, of the right to maintain a sewer through the petitioner's land, the petitioner's counsel said in the preliminary examination of the witness called as an expert on value, "What I am getting at here is the value of that supply of water in connection with the land — what is the value of that combination? I mean that value which is independent of the neighborhood which lies behind it. Its value for manufacturing purposes." After that eighteen questions were put to the witness and a discussion by counsel ensued before the judge ruled that the witness was qualified to testify to value; and the witness was then asked: "What is the value, the fair market value of this combination of land with the water power for the purposes of a printing business?" *Held*, that this question could not have been understood by the witness as having been qualified by the statement made by counsel in the preliminary examination. *Ibid.*

22. Where a written contract is plain, evidence of a custom which contradicts it is inadmissible, as is also evidence of the conduct of a party offered to aid in its construction. *Menage* v. *Rosenthal*, 358.

23. In an action to recover salary from a certain date under a written contract, by which the defendant agreed to pay the plaintiff a certain sum weekly for his services as a travelling salesman, evidence from which it appears that the plaintiff had not, prior to such date, demanded more than one half of that sum during the preceding six months, is inadmissible on the ground that his refusal to continue travelling unless he was paid the weekly sum named in the contract was unreasonable. *Ibid.*

24. In an action for libel against a member of an association who reported

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the plaintiff's name, upon his refusal to pay a claim of the defendant, to the association, with the result that the plaintiff's name was placed upon a black list, letters written after the action was begun, declining to deal with the plaintiff on the ground that his name was on such list, are admissible in evidence. *Weston* v. *Barnicoat*, 454.

25. In an action for breach of an agreement, letters written, after the controversy had arisen, by the plaintiff to the defendant, a corporation, and letters in reply thereto written in its behalf by the defendant's general manager, who in its behalf took part in and conducted the correspondence with respect to the transaction in controversy, are rightly admitted in evidence, those written by the plaintiff being competent so far as they tend to qualify, explain, or aid in the construction of those written in the defendant's behalf, and the latter being competent as its admissions; and the defendant is not prejudiced by the instruction that the letters are to be considered by the jury only so far as they contain statements inconsistent with the testimony of the writers, both of whom were witnesses, and that the jury may consider the letters so far as they affect the credibility of those witnesses. *Buffum* v. *York Manuf. Co.* 471.

26. Evidence that the officers of a town sent to the sureties on the bond of its collector of taxes copies of a book published by the town for certain years, containing printed copies of the reports of the auditor and of the treasurer of the town for those years, which reports contained alleged false statements as to the accounts of the collector of taxes, inducing the sureties to lie quiet and to take no steps to protect themselves from loss until the collector, who was a defaulter, had transferred his property and the lien for uncollected taxes was lost, is inadmissible in an action by the town on the bond. *Winthrop* v. *Soule*, 400.

27. While a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea was entered, a record showing a conviction on such a plea is not admissible in another proceeding to show that the defendant was guilty. *White* v. *Creamer*, 567.

28. A mortgage deed more than thirty years old is admissible in evidence without proof of its execution, although a witness is living and in court, and without proof of possession under it. *Cunningham* v. *Davis*, 213.

See ADMINISTRATOR; APPEAL, 7; ASSIGNMENT; ATTESTATION; BROKER, 2; CONFESSION; DEPOSITION; EMPLOYERS' LIABILITY ACT, 2, 6, 8; ESTATES OF PERSONS DECEASED, 2–5; EXCEPTIONS, 3, 7–9; FORCIBLE ENTRY AND DETAINER, 2, 4; HIGHWAY, 3; ICE, 3–5; INSURANCE, 2; MALICIOUS PROSECUTION; MASTER AND SERVANT, 9–11; MASTER IN CHANCERY, 3–5; MORTGAGE, 2, 4; NEGLIGENCE, 2, 14, 19; NEW TRIAL; ORDINANCE; PARTNERSHIP, 1; PERJURY; PHYSICIAN, 2, 3; PROMISSORY NOTE, 2; TAX, 7; TRIAL, 2–6, 8–13, 15–17; VARIANCE; WAIVER; WITNESS.

EXCEPTIONS.

1. As a general rule no inquiry into the merits of a bill of exceptions is open on a petition to prove them, but it is perfectly logical to dismiss such a

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petition on the ground that there is nothing in the exceptions if they are proved. *Fitch* v. *Jefferson*, 56.

2. No exception lies to the refusal to give instructions in the language requested, if they are sufficiently covered by the instructions given. *O'Neil* v. *Hanscom*, 313; *Boston Dairy Co.* v. *Mulliken*, 447; *Weston* v. *Barnicoat*, 454.
3. Exceptions to the refusal to give rulings requested, which relate to the duty of the jury upon all the evidence, will be overruled, if the bill of exceptions states no evidence. *Commonwealth* v. *Richardson*, 202.
4. A question of pleading not raised at the trial is not open on exceptions in this court, although the bill of exceptions states that the pleadings are made a part thereof. *Carpenter* v. *Fisher*, 9.
5. A request for a ruling, which is not applicable to the facts appearing in the exceptions or to the state of the case as finally submitted to the court, is rightly refused. *Cunningham* v. *Davis*, 213.
6. It cannot be said, as matter of law, that there was error in declining to give a ruling requested, if it does not appear that the bill of exceptions contains all of the evidence material to such request. *York* v. *Barstow*, 167.
7. If a question to a witness is objected to, no reason being given for the objection, and an exception taken, and no objection is made to the answer, a ground for the objection being taken in this court which was not taken at the trial nor in any way called to the judge's attention, the question itself not being objectionable, and no motion being made then or afterwards to strike out the answer, the exception will be overruled. *Packer* v. *Thomson-Houston Electric Co.* 496.
8. No exception lies to the admission in evidence of an auditor's report objected to for the first time upon the ground that his conclusions were based on incompetent evidence. *Winthrop* v. *Soule*, 400.
9. An expert may testify to value, although his knowledge of details is chiefly derived from inadmissible sources, but the fact that he may use hearsay as a ground of opinion does not make the hearsay admissible. *National Bank of Commerce* v. *New Bedford*, 257.

See APPEAL, 6; EQUITY, 14; MASTER IN CHANCERY, 1–3; MECHANIC'S LIEN, 5; NEGLIGENCE, 9, 10; REDEMPTION; SENTENCE.

EXECUTION.

The omission to credit on a judgment certain sums received thereon does not render an execution taken out on the judgment null and void, or a sale thereunder invalid, if such omission was not fraudulent. *Berry* v. *Gates*, 373.

See ABSENT DEFENDANT, 1; DEED, 3; RETURN.

EXECUTOR.

See ASSIGNMENT; LIMITATIONS, STATUTE OF; PROBATE COURT, 2.

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EXPERT.

See EVIDENCE, 16–21; EXCEPTIONS, 9; MASTER AND SERVANT, 10.

FALSE REPRESENTATIONS.

See INFANT.

FEE.

See DEED, 2; EMINENT DOMAIN.

FIRE INSURANCE.

See AWARD; DECLARATION, 2, 4; INSURANCE, 1, 2.

FORCIBLE ENTRY AND DETAINER.

1. An action on Pub. Sts. c. 175, for forcible entry and detainer, brought by the administrator of the estate of a mortgagee of the land before the expiration of three years from the foreclosure of the mortgage, is within the time prescribed by § 10. *Cunningham* v. *Davis*, 213.
2. It is within the discretion of the judge, in an action on Pub. Sts. c. 175, for forcible entry and detainer, to allow the plaintiff to discontinue as to one of the defendants who is shown by the evidence not to have resided on the premises for several years before the trial. *Ibid.*
3. The administrator *de bonis non* of the estate of a mortgagee of land may maintain an action on Pub. Sts. c. 175, for forcible entry and detainer, when the mortgage has been foreclosed by entry without the exercise of a power of sale. *Ibid.*
4. Upon a witnessed mortgage note, more than twenty years after it was due, was an indorsement signed by the payee of the receipt on a day named of a note for a certain sum, "being balance of the within note and interest to date"; and a new note bearing that date for the sum so named was signed by the mortgagor, payable in six years to the mortgagee, and witnessed. The first note showed no further payments, but there were two indorsements on the second note, the last one being within twenty years of the date of an action on Pub. Sts. c. 175, by the mortgagee to recover possession of the premises. As to this last indorsement the payee's daughter testified that she made it in the maker's presence at the request of her mother, to whom the money was claimed to have been paid, the money being then on a table; but she did not testify to the amount of the money, and there was no other evidence that the maker knew the contents of the paper on which the indorsement was made, or that he ever saw it after it was made. A computation of the sum due on the first note showed that the sum named in the last indorsement thereon was a fair statement of the balance; and the second note and the mortgage were

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kept by the mortgagee. *Held*, that the indorsement on the original note was rightly admitted in evidence; and that the judge was justified in finding that the second note was a renewal of the balance due on the first note, and that the payment last indorsed on the second note was made in part payment of the mortgage debt. *Cunningham* v. *Davis*, 213.

See MORTGAGE, 4.

FORECLOSURE.

1. It is not necessary to foreclose an instrument, which is not a mortgage, but a defeasible assignment of a chose in action, which the assignee has a right to collect in case of breach. *McKie* v. *Gregory*, 505.
2. After an entry to foreclose a mortgage, the mortgagor and those claiming under him become tenants at sufferance of the mortgagee, and in the absence of any evidence of an adverse holding they are assumed to hold under him, and their possession is his during the three years until the completion of the foreclosure. *Cunningham* v. *Davis*, 213.

See DEED, 3; EQUITY, 3; FORCIBLE ENTRY AND DETAINER, 1, 3; MORTGAGE, 4; PLEDGE, 2.

FOREIGN CORPORATION.

See ABSENT DEFENDANT, 1; ATTESTATION, 1; CONSTITUTIONAL LAW, 7.

FOREIGN LAWS.

See BANK.

FRAUD.

See ACTION, 2; EQUITY, 10, 11; ESTATES OF PERSONS DECEASED, 1, 6; EVIDENCE, 26; EXECUTION; INFANT; NULLITY OF MARRIAGE; PATENT; RETURN.

FRAUDS, STATUTE OF.

1. It is immaterial that the memorandum of an alleged contract is in the form of a letter, if it is sufficient in other respects to satisfy the statute of frauds. *Walker* v. *Walker*, 349.
2. The signing by the defendant by his Christian name only is as binding upon him, within the statute of frauds, as if his signature were written in full. *Ibid.*
3. An oral agreement which will be completely performed according to its terms and intention if either party should die within the year, is not within the statute of frauds. *Scribner* v. *Flagg Manuf. Co.* 536.

See PROMISSORY NOTE, 2; WAIVER.

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GAMING.

See PUBLIC POLICY.

GIFT.

See CONSTITUTIONAL LAW, 1.

GRADE CROSSING.

1. If a crossing as it now exists is not in fact a grade crossing, the circumstances that it was once such a crossing and that the grades of the street and the railroad have been separated under proceedings in accordance with Pub. Sts. c. 112, §§ 129 *et seq.*, begun before the passage of the present act to promote the abolition of grade crossings, St. 1890, c. 428, do not make the crossing one with which the Superior Court can deal upon a petition under the last named statute. *Northampton* v. *New Haven & Northampton Co.* 430.
2. A gas company cannot maintain a petition under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, relating to the abolition of grade crossings, against a town to recover the expense incurred by the petitioner in taking up and relaying its main pipe in a street, the grade of which has been altered by proceedings under those statutes. *Natick Gas Light Co.* v. *Natick*, 246.
3. Under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, relating to the abolition of grade crossings, and providing for the recovery of damages sustained by an abutter on a way by the discontinuance of such way "to the same extent as damages are now recoverable by law by abutters on ways discontinued by towns," a gas company, which owns land abutting on a street discontinued by proceedings under those statutes, cannot recover against the town, if it is not shown that the loss of the right to keep its main pipe in the street diminished the value of its land; but it may recover against the railroad corporation the value of so much of the pipe as lay in its land which was taken by the proceedings in question. *Ibid.*

See RAILROAD COMMISSIONERS, 2.

GUARDIAN AND WARD.

See APPEAL, 8; PROBATE COURT, 2.

HEARSAY.

See EXCEPTIONS, 9.

HEIR.

See ESTATES OF PERSONS DECEASED, 6.

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HIGHWAY.

1. Work having been done in repairing a way and not as original construction or as specific repairs, the verdict should have been for the petitioner, as the petition was seasonably brought under Pub. Sts. c. 52, §§ 15, 16. *Albro* v. *Fall River*, 590.
2. If a change of grade is made by an authority competent to establish the grade, and the nature and extent of the change are specifically declared in the proceedings, the work is a specific repair under Pub. Sts. c. 49; but if the work is done or ordered by an authority which does not have the power to establish the grade, or if done or ordered by such an authority, the order does not specify the nature and extent of the change, and the change is made under an authority competent to direct the repair of ways so that they may be safe and convenient for travellers, the change is made under Pub. Sts. c. 52, and the damages are recoverable under that chapter. *Ibid.*
3. On a petition, under Pub. Sts. c. 52, §§ 15, 16, for a jury to assess damages occasioned by raising the grade of a street in front of the petitioner's premises by a street railway company in the construction of its railway, it appeared that the act of raising was that of the railway company alone and was not something done for the purpose of keeping the way safe and convenient for travel; and the evidence did not even show that it was done to the satisfaction of the superintendent of streets, much less that it was done by him or by the city. *Held*, that the judge rightly ordered a verdict for the respondent. *Vigeant* v. *Marlborough*, 459.
4. If, in an action under Pub. Sts. c. 52, § 18, for injuries occasioned to a traveller on a highway, there is no evidence that the defendant knew of the defect if there was one, in the absence of evidence to show how long it had been there, it cannot be said that the defendant ought, in the exercise of reasonable care and diligence, to have known of it and remedied it. *Parker* v. *Boston*, 501.
5. In this case, which was an action for personal injuries occasioned to the plaintiff by falling into an excavation ten feet in length between the rails of a street railway track where the defendant city was building a tidewater in a sewer, the defendant being engaged in a lawful work, having erected barriers with signs to show that the way was not open to public travel, having had a watchman on the spot night and day, and what happened not reasonably being expected to happen, it cannot be said that there was any want of the "reasonable care and diligence" required by the Pub. Sts. c. 52, § 18. *Martin* v. *Chelsea*, 516.

See CITY; DEED, 2; EMINENT DOMAIN; GRADE CROSSING; RAILROAD COMMISSIONERS, 2; TOWN, 1.

HUSBAND AND WIFE.

If, in an action for board furnished to the defendant's wife, it appears that she was homeless, had been deserted by the defendant without justifiable cause, had no personal property, and had such an interest in real estate

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that she could not realize upon it so as to relieve her distress, a ruling that "the wife having property of her own the husband was not liable for necessaries furnished to her without his knowledge or assent by one who knew the wife's circumstances" is rightly refused, and a finding for the plaintiff is correct. *Prescott* v. *Webster*, 316.

See CONTRACT, 1; DIVORCE; EQUITY, 7; ESTATES OF PERSONS DECEASED, 2; NULLITY OF MARRIAGE.

ICE.

1. Ice is not included in the term "provisions," within Pub. Sts. c. 68, § 1, permitting any person to go from place to place in the same town exposing for sale and selling provisions. *Commonwealth* v. *Reid*, 325.
2. Driving a load of ice through the streets of a city, calling out "Ice," and twice selling ice to a person standing in the street who then and there paid for the same, is sufficient evidence that the one doing these acts was going from place to place carrying and exposing merchandise for sale; and the fact that he did this as an employee of a solvent corporation which not only sent out a cart to peddle ice, but also delivered ice to persons who had previously ordered the same, and the further fact that the occupants of the house to which the purchaser above mentioned had directed the ice bought by him on the street to be delivered, were among the customers in the list handed by the corporation to the employee, do not make his actions any the less a violation of Pub. Sts. c. 68, § 16. *Ibid.*
3. In view of the fact that the defendant in a complaint for unlawfully carrying and exposing ice for sale was seen driving along a street and calling out "Ice," sales made by him on the street are evidence on which the jury are warranted in finding that selling ice from a wagon driven by him was within the general scope of his business. *Ibid.*
4. The fact that the defendant in a complaint for unlawfully carrying and exposing ice for sale, some time after the sales shown in evidence were made, ceased to be employed by the corporation in whose employ he then was, shows that he was employed temporarily in the established business of that corporation, and not that, at the time in question, he was engaged in a temporary or transient business, within St. 1890, c. 448; and, if he were engaged temporarily in peddling ice for that corporation, he is guilty of a violation of Pub. Sts. c. 68, § 16. *Ibid.*
5. Evidence that a person in the employ of a corporation drove through a street, calling out "Ice," and sold ice from the wagon to a person on the street who paid for the same, does not tend to prove that the former was an itinerant vendor, within St. 1890, c. 448, but tends to show that he was peddling ice for the corporation, which also conducted an established business in selling ice. *Ibid.*
6. A complaint, alleging that, on a day named, at Boston, the defendant "did sell to the complainant," in a certain street, "a certain article, to wit, a piece of ice, said complainant being then and there on said street,

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and said defendant not then and there having a permit from the superintendent of streets of said city of Boston to sell as aforesaid," sufficiently describes a violation of Rev. Ord. of Boston of 1890, c. 43, § 35, within Pub. Sts. c. 213, § 17, providing that in such a case the by-law on which the complaint is founded need not be set forth. *Commonwealth* v. *Reid*, 325.

See COMPLAINT, 2.

ILLEGALITY.

See CONTRACT, 1, 2.

IMPRISONMENT.

See INDICTMENT; SENTENCE.

INDICTMENT.

It is no objection to the sufficiency of an indictment under the habitual criminal act, St. 1887, c. 435, that the sentence imposed upon the second previous conviction alleged in the indictment took effect from the expiration of the sentence imposed upon the first previous conviction alleged, so that there was no interval of liberty between the two terms of imprisonment. *Commonwealth* v. *Richardson*, 202.

See COMPLAINT, 2; CONFESSION; EVIDENCE, 4; PERJURY, 2.

INDORSEMENT.

See PROMISSORY NOTE, 1.

INFANT.

An infant cannot be held liable in tort for deceit or conversion the proof of which requires the plaintiff to show that a contract, which by the infant's false representations relative to his age he was induced to make and perform, was part and parcel of the fraudulent transaction. *Slayton* v. *Barry*, 513.

See BASTARDY PROCESS, 3; EVIDENCE, 14, 15; WITNESS.

INJUNCTION.

See CONTRACT, 4; EQUITY, 1, 4.

INSANITY.

See APPEAL, 8; ESTATES OF PERSONS DECEASED, 6; WITNESS.

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INSOLVENCY.

A. made a promissory note to B. and gave him a mortgage of real estate as security therefor. B. indorsed the note and assigned the mortgage to C. *Held*, on the insolvency of B., that C., who declined to deliver up the mortgage, had no mortgage or pledge of the estate of B., and hence was not forbidden or restrained in his proof by Pub. Sts. c. 157, § 28, or by any other provision of the statute. *Hale* v. *Leatherbee*, 547.

See ESTATES OF PERSONS DECEASED, 1; INSURANCE, 3; JUDGMENT, 3; PARTNERSHIP, 2.

INSTRUCTIONS.

See EMPLOYERS' LIABILITY ACT, 3; EVIDENCE, 25; EXCEPTIONS, 2; MASTER AND SERVANT, 12; NEGLIGENCE, 7, 14; TRIAL, 3, 7.

INSURANCE.

1. The writ in an action upon an award made under a policy of fire insurance was dated three days before the expiration of the time limited in the policy for bringing an action, but it was not served until about fifty days afterwards, and was duly entered at the next entry day. Two witnesses testified that they saw the writ on the day of its date. *Held*, that the action was seasonably commenced. *Farrell* v. *German American Ins. Co.* 340.
2. In this case, which was an action on a policy of insurance containing a provision that it should be void, if, without the assent of the insurance company, "the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent," the judge was justified, on the evidence, in refusing to rule, as matter of law, that the plaintiff was not entitled to recover and in submitting the question to the jury. *Johnson* v. *Norwalk Fire Ins. Co.* 529.
3. A person was insured in an assessment insurance company against loss of time by reason of accidental bodily injuries at a certain rate per week, or, in case of death resulting from the injuries within ninety days thereafter, for a stated sum. He received accidental bodily injuries on June 28, and died as a result thereof on August 31; a receiver of the company having been appointed in the interim on August 12, on a bill filed August 9. Section 14 of St. 1890, c. 421, provides that in case of insolvency any unexpended portion of the emergency fund is to be first applied in the payment of "accrued claims." *Held*, that the claim for death was not an accrued claim, and that claims for disability were divisible and had accrued only to the time of the filing of the bill. *Attorney General* v. *Equitable Accident Insurance Association*, 196.

See AWARD; DECLARATION, 2, 4; TRUSTEE PROCESS.

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INTEREST.

See ASSIGNMENT.

JUDGE.

See COVENANT; EVIDENCE, 15; FORCIBLE ENTRY AND DETAINER, 2, 4; HIGHWAY, 3; MALICIOUS PROSECUTION; NEW TRIAL; TRIAL, 1, 4, 6, 9, 10, 12, 13; TRUST AND TRUSTEE, 4; WITNESS.

JUDGMENT.

1. While a judgment must not be for damages in excess of the *ad damnum*, it may give costs in addition to that amount. *French* v. *Goodnow*, 451.
2. In an action begun in a police court by trustee process, the plaintiff, by taking judgment against the defendant alone, discontinues as against the trustee and waives all right to pursue him further, and, the trustee being thereby discharged, the fact that he was afterwards defaulted for not appearing is an error of the clerk which cannot affect the validity of the judgment rendered against the defendant. *Dalton-Ingersoll Co.* v. *Fiske*, 15.
3. If the plaintiff in an action pending in a police court puts it on the trial list and gives the required notice to the defendant, who fails to appear, the latter may be defaulted and judgment may be entered against him, although a motion for continuance to await the result of insolvency proceedings is pending. *Ibid.*

See ABSENT DEFENDANT, 1–3; APPEAL, 4; CITY; COURT OF REGISTRATION; DECLARATION, 3; EXECUTION; MECHANIC'S LIEN, 4, 6; MONEY PAID; RETURN; SCIRE FACIAS, 2; STAY OF PROCEEDINGS; SUPERIOR COURT; TRIAL, 14; TRUSTEE PROCESS.

JURISDICTION.

See ABSENT DEFENDANT, 4; APPEAL, 5; BASTARDY PROCESS, 2; DEPOSITION; EQUITY, 6; PROBATE COURT, 1.

JURY.

See ASSIGNMENT; EMPLOYERS' LIABILITY ACT, 3, 6; EVIDENCE, 25; EXCEPTIONS, 3; HIGHWAY, 3; ICE, 3; INSURANCE, 2; MORTGAGE, 1; NEGLIGENCE, 2, 4, 6, 9, 11; PRINCIPAL AND AGENT, 2; TRIAL, 1, 7, 9, 10; WAIVER.

LANDLORD AND TENANT.

See DEED, 2; TENANT AT SUFFERANCE; WRIT OF ENTRY, 2.

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LARCENY.

See EVIDENCE, 4.

LAW AND FACT.

See APPEAL, 6; EMPLOYERS' LIABILITY ACT, 6; EXCEPTIONS, 6; INSURANCE, 2; MALICIOUS PROSECUTION; MASTER AND SERVANT, 1, 10; NEGLIGENCE, 2–4, 9, 11; TRIAL, 10.

LAW OF THE ROAD.

See NEGLIGENCE, 14, 15.

LEASE.

See BOND, 2; MECHANIC'S LIEN, 1; TENANT AT SUFFERANCE.

LEGACY.

See DEVISE AND LEGACY.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LIBEL.

1. That the plaintiff was indebted to the defendant may not be an obstacle to the maintenance of an action for libel in causing the circulation of a black list containing the plaintiff's name, which was reported to an association of which the defendant was a member for that purpose, upon the plaintiff's declining to pay the defendant's claim. *Weston* v. *Barnicoat*, 454.
2. In an action for libel against a member of an association who, upon the plaintiff's declining to pay his claim, reported the plaintiff's name to the association, with the result that his name was placed on a black list, which act caused the discontinuance of business dealings with him by members of the association, all in accordance with its by-laws, it cannot be ruled that the circulation of the black list was privileged. *Ibid.*
3. If a member of an association reports the name of a debtor who has declined to pay his claim, with the intended result that the debtor's name is placed on a black list, which act causes the discontinuance of business dealings with him by members of the association, in an action by such person against his creditor for libel, the judge rightly refuses to rule that the defendant is not responsible for what the association or its officers did under its by-laws in connection with publishing the plaintiff's name. *Ibid.*

See EVIDENCE, 24.

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LICENSE.

See COMPLAINT, 2; PHYSICIAN, 2.

LIEN.

See MECHANIC'S LIEN; PLEDGE, 1.

LIFE ESTATE.

See DEVISE AND LEGACY; TAX, 4.

LIMITATIONS, STATUTE OF.

In case of an appeal from a decree of the Probate Court allowing a will, the two years, within which an executor shall be held to answer to the suit of a creditor of the deceased under Pub. Sts. c. 186, § 9, begin to run from the date when the decree of the Probate Court is affirmed. *Smith* v. *Smith*, 483.

LIQUIDATED DAMAGES.

See ABSENT DEFENDANT, 2; BOND, 2.

MALICIOUS PROSECUTION.

In an action of tort for the alleged malicious arrest of the plaintiff, the credibility of the evidence and the facts to be drawn from it by inference are for the justice who tries the case without a jury, and the question of probable cause is one of fact. *Londy* v. *Driscoll*, 426.

MANDAMUS.

Mandamus will not lie against the building commissioner of the city of Boston to correct an alleged error of the Court of Appeal, provided for by St. 1892, c. 419, in withholding a permit to make alterations in the petitioner's building. *Greene* v. *Damrell*, 394.

MARRIAGE.

See DIVORCE; NULLITY OF MARRIAGE.

MASTER AND SERVANT.

1. Immoral acts or misconduct exhibiting moral turpitude on the part of a person employed as a salesman do not necessarily, as matter of law, render

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him unfit to continue in his employment or justify his discharge therefrom. *Child* v. *Boyd & Corey Manuf. Co.* 493.

2. An agreement, in a written application to a railroad corporation for employment, to make as soon as possible a careful examination of all things near the tracks, so that the dangers attending them may be understood, is not contrary to St. 1894, c. 508, § 6, (Pub. Sts. c. 74, § 3,) forbidding an employer to contract with an employee for exemption from liability for injury. *Quinn* v. *New York, New Haven, & Hartford Railroad*, 150.
3. If a railroad corporation furnishes for the use of its servants a sufficient supply of suitable links for connecting its cars, it is not bound to keep the links used in proper condition, or to prevent the use of dangerous and unsuitable links. *Miller* v. *New York, New Haven, & Hartford Railroad*, 363.
4. If, in an action against a railroad corporation for personal injuries caused by the bursting of an appliance upon a locomotive engine on which the plaintiff was employed, the only fair inference to be drawn from the whole evidence is that the appliance was put upon the locomotive for a legitimate purpose, that it was of a kind well known and in common use for that purpose, that it was purchased from a well known and reputable maker by whom it had been thoroughly and carefully tested, and that it was the usual course to put it into use in the condition in which it was, without a guard, no negligence on the defendant's part can be found. *Fuller* v. *New York, New Haven, & Hartford Railroad*, 424.
5. In an action against a railroad corporation for personal injuries occasioned, by the bursting of a glass tube of an oiler upon a locomotive engine, to the plaintiff, who had been a locomotive fireman for six months and had run a stationary engine before that, and who knew that the pressure of the steam in the boiler acted in the glass tube of the oiler and was liable to cause the tube to burst, he will be held to have assumed an obvious risk of his employment and to be precluded from maintaining the action. *Ibid.*
6. A person, who has been employed in one die-shop for eleven months, during which he was engaged in grinding for one third of the time, including, during a part of that time, "truing" the grindstone, and who has worked for the defendant for eight months, and during that time was employed in grinding dies and "truing" the grindstone whenever there was any grinding to be done, will be held to have assumed the risks arising from the position of the stone in relation to the rest which supported the "truing iron," and from the facts that there was a spring to the rest, that the straps of the groove in the top of the timbers were loose, that the threads of the nuts screwed on the tops of the bolts attached to the ends of the rest were worn, and that he was furnished with a gas pipe in place of a quarter-inch wire, or a roll, for use in "truing" the grindstone, and such a person cannot maintain an action against his employer for injuries sustained, while "truing" the stone, by having his hand carried with the point of the pipe down between the rest and the stone, though there is evidence that he is not an experienced grinder. *Smith* v. *Beaudry*, 286.
7. The facts, that when a person suing for an injury, who previously had been employed to work on a grindstone, was employed a second time, four

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months after his first employment terminated, he was employed not to grind but to help the finishers, and that it was not until three months later that he was set to grinding, do not take his previous experience out of the case; and the danger arising from the stone being swung over five inches above the beams on which the rest supporting the die travelled, is an obvious risk of his employment assumed by him. *Smith* v. *Beaudry*, 286.

8. Where the risk arising from the position of a machine is obvious and must be held to have been assumed by a workman using it, it is of no consequence that the business might have been conducted more safely by his employer. *Ibid.*

9. At the trial of an action for personal injuries, it appeared that the plaintiff was employed in the defendant's lumber yard, had worked there for ten or eleven years, and was experienced in the business; that he was at work on top of one of the piles of lumber, toward the rear, when the end of the board on which he stood sank under his weight, probably by reason of its having a shorter board underneath it, and that the boards in the pile were laid so that their ends were even on the front of the pile; but, as the boards were of different lengths, the rear of the pile was uneven, the longer boards projecting over the shorter ones. The plaintiff testified that he thought all the planks under the place where he was standing were long, although he knew that the pile was determined by the width not by the length of the boards, knew generally that boards of different lengths were put in the same pile, and seemingly knew that there were boards of different lengths in this pile. *Held*, that the plaintiff assumed the risk, that a pile of boards is not ways, works, or machinery, within the employers' liability act, St. 1887, c. 270, and that this opinion as to the defendant's duty made certain evidence immaterial. *Campbell* v. *Dearborn*, 183.

10. If experienced experts testify for the defendant in an action for personal injuries that a certain movement of a machine which caused the injury was impossible, the plaintiff cannot be said, as matter of law, to have assumed the risk of its happening. *Packer* v. *Thomson-Houston Electric Co.* 496.

11. Evidence that a machine, which was so constructed that it would not repeat its movement without coming to a full stop or start from a full stop, if it were in order, was out of order and not safe to run, that it started from a full stop after it had repeated, and that the repeating was reported by the person who was employed on the machine and was injured by such movement, will warrant a finding of negligence on the part of the employer in an action for the injury. *Ibid.*

12. In an action for personal injuries caused by an alleged defective machine, A., who examined the machine soon after the accident, testified that he found several specified defects in it; that, taking the condition in which he found it, he should say that it was an unfit machine to be used just then; and that "it was not safe to run it, as it would not stop at every revolution." The defendant's witnesses testified that these defects would not cause the machine to start from a full stop, but there was evidence that the machine with these defects did so start, and caused the injury. *Held*, that the jury could not properly be instructed that "if the defects in the

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machine, as ascertained and described by A., were all that existed at the time of the accident, the plaintiff cannot recover." *Packer* v. *Thomson-Houston Electric Co.* 496.

See ACTION, 3; EMPLOYERS' LIABILITY ACT; EVIDENCE, 7, 8, 10, 11; ICE, 2, 4, 5; NEGLIGENCE, 7, 8, 12, 13; TRIAL, 5.

MASTER IN CHANCERY.

1. The only purpose served by exceptions to a master's report in equity is taking an appeal to rulings made by him. The statement of what rulings were made by the master must appear in his report or otherwise on the record of the cause, and any statement of them in the exceptions will be disregarded as impertinent. *O'Brien* v. *Keefe*, 274.

2. If exceptions are taken to rulings alleged to have been made by a master in a cause heard by him under a decree directing him to hear the cause and find the facts, and the record does not disclose that the rulings alleged to have been made were made by the master, the exceptions must be overruled. *Ibid.*

3. If testimony identifying a witness as the person who was convicted of a crime, the details of which are stated, is admitted *de bene* by a master at the hearing before him, on the counsel introducing the testimony stating that he expects to introduce a record of the witness's conviction of the crime in question, and such record is not produced and no motion is made to have the testimony ruled out, and the master, in a supplemental report made under an order recommitting the cause to him and directing him to state what action he took as to this evidence, states that, in considering the evidence in the case, he treated this testimony as if it had been ruled out, and that neither counsel referred to it in the argument of the case in which they discussed the weight of the witness's testimony and his character, an exception taken to the admission of the evidence *de bene* is properly overruled. *Ibid.*

4. At a hearing before a master, the chief of police of a town was summoned as a witness for the purpose of procuring the records of a trial justice which were not forthcoming. On his testifying to his ignorance of the records, he was asked, "Have you got any papers with you?" and he testified, "that he had his day-book." He was then asked if he had known a certain witness for a good many years, and he testified that he had known him "quite a number of years." This was objected to. The master, in the supplemental report mentioned above, stated that this testimony, together with the testimony as to the identity of the witness, was not considered by him or referred to in argument, and was treated as ruled out. *Held*, that the plaintiff did not show that he was prejudiced by the admission of the testimony. *Ibid.*

5. It is proper for a master in equity to whom a cause has been recommitted as stated above, to state in a supplemental report that he treated certain evidence as ruled out which was admitted *de bene* and not subsequently made good, and which the objecting party neglected to move should be ruled out. *Ibid.*

See REDEMPTION.

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MECHANIC'S LIEN.

1. A mechanic's lien may be enforced, under Pub. Sts. c. 191, § 1, upon a building erected by the lessee under a lease of the land for a term of years which requires the erection of the building, and which prevents the building from becoming a part of the realty, and upon the lessee's estate for years in the land, for labor performed on the building by employees of the contractor with the lessee. *Forbes* v. *Mosquito Fleet Yacht Club*, 432.

2. A person went to the registry of deeds with a statement of a mechanic's lien to be filed, within one hour after the usual time for closing the office on Saturday afternoon, which was the last day of the time allowed for filing such statements by Pub. Sts. c. 191, § 6. He got into the office after it was closed, tendered the statement and the fee to the register, who was there, but refused to receive it. By the register's suggestion, he put the statement and fee into an envelope which the register gave him, went outside of the office and pushed the envelope under the closed door, through the glass panel of which he was watched by a clerk. The envelope was on the register's desk on Monday morning, and the statement was marked as filed on that day. *Held*, that the statement was filed on Saturday afternoon. *Orne* v. *Barstow*, 193.

3. *It seems*, that the certificate of a register of deeds is conclusive as to the time of filing an instrument, but may be amended by him. *Ibid.*

4. Where the parties to several petitions to enforce mechanics' liens, under Pub. Sts. c. 191, are the same, although no order of consolidation is made, it is within the power of the Superior Court, upon appeal from a District Court, to consider the cases as one, and to enter an order of sale in one of the cases, and to recite in that case the names of the lienors who have established their liens in either one of the cases, and the amount due on each as established by the judgments of the lower court, from which no appeal was taken, or by the Superior Court; and separate costs are properly allowed in each case. *Dahlborg* v. *Wyzanski*, 34.

5. Where several petitions to enforce mechanics' liens under Pub. Sts. c. 191, are tried together, if exceptions taken at the trial as to one of the claims are undisposed of, the proceeds of a sale ordered upon the establishment of the liens cannot be distributed under § 28, but must be held and disposed of under § 29, making provision for cases where all the claims are not ascertained. *Ibid.*

6. An order of the Superior Court for the sale of property against which a mechanic's lien is established, and an order for distribution of the proceeds under Pub. Sts. c. 171, § 28, are so far separate and distinct that the order of sale may be valid and effective although the order of distribution may be invalid, and the judgment as to one of several claims of lien considered together may be valid notwithstanding the judgment upon another may be wrong. *Ibid.*

7. Where land is conveyed to a person, who makes a mortgage of it, excepting a certain portion, upon which portion subsequently a third person does work, the latter cannot maintain a mechanic's lien therefor, if he files in the registry of deeds a statement which follows the description of

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the premises in the mortgage, thus excluding by metes and bounds the land on which the work was done; and the fact that the statement, besides the description by metes and bounds, contains the words "being the same premises described in deed" to the respondent and in the mortgage, does not help the petitioner. *Muto* v. *Smith*, 175.

See CONSTITUTIONAL LAW, 5.

METROPOLITAN SEWER ACT.

See EVIDENCE, 21.

MINOR.

See INFANT.

MISJOINDER.

See DECLARATION, 1.

MISTAKE.

A mistake, not with reference to the existence at the time of a certain fact, but simply as to the probability of the occurrence of a future event, is not a mistake of fact within the meaning of that term in the rules in equity concerning the rescission or reformation of a contract. The mistake must be with reference to a fact past or present. *Parke* v. *Boston*, 464.

See MONEY PAID.

MONEY HAD AND RECEIVED.

See TAX, 3.

MONEY PAID.

1. If a bank pays money to satisfy a judgment obtained against it by mistake as trustee of the principal defendant in a court of competent jurisdiction, in an action in which the bank was duly served with process, and appeared and voluntarily took such steps as made the judgment a necessary result of the proceedings, it cannot recover the money of the plaintiff in the original action so long as the judgment is unreversed. *People's Savings Bank* v. *Heath*, 131.
2. That an action by a bank to recover money paid to satisfy an unreversed judgment is submitted on agreed facts, so that all objection to the form of action are waived, cannot authorize the court to disregard the effect of the former judgment. *Ibid.*

MORTGAGE.

1. Possession of personal property by the mortgagor is a condition precedent to summoning the mortgagee as trustee under Pub. Sts. c. 161, § 79,

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and to a trial by jury of the validity of the mortgage under § 81 of that chapter. *Drysdale* v. *Wax*, 144.

2. If a mortgage is given as security for the payment of a promissory note, it may be shown that the note is without consideration, and that therefore the mortgage cannot be enforced; and admissions of the mortgagee, who has deceased, to show that no debt ever existed between the parties to the mortgage are rightly received. *Saunders* v. *Dunn*, 164.
3. The transfer of the mortgage note and the assignment of the mortgage to the original mortgagor after the premises have been sold subject to the mortgage, the grantee not assuming to pay it, do not constitute a discharge of the mortgage so that it cannot be enforced against the property. *Pratt* v. *Buckley*, 115.
4. If the mortgagor of land which has been conveyed subject to the mortgage, the payment of which is not assumed upon the mortgagee threatening to foreclose the mortgage if the mortgage note is not paid, and to hold the mortgagor responsible for any deficiency, causes the amount of the note to be furnished to the grantee of the land, and subsequently takes an assignment of the mortgage and forecloses it, evidence showing that the mortgagor's intention in paying the money was to obtain the benefit of the mortgage security for a debt which was a charge upon the land, is competent in an action on Pub. Sts. c. 175, by the purchaser at the foreclosure sale to recover possession of the premises. *Ibid.*

See DEED, 3; EQUITY, 3, 4; EVIDENCE, 28; FORCIBLE ENTRY AND DETAINER, 1, 3, 4; FORECLOSURE; INSOLVENCY; MECHANIC'S LIEN, 7; SAVINGS BANK.

MUNICIPAL CORPORATION.

See CITY; TOWN.

NATIONAL BANK.

See APPEAL, 6; TAX, 7, 8.

NECESSARIES.

See HUSBAND AND WIFE.

NEGLIGENCE.

1. At the trial of an action for injuries to the plaintiff's property by the blasting of rocks upon adjoining land of the defendant, the defence relied on was that the work was in the hands of an independent contractor. The contract contemplated that blasting would be done, and the place where it was done was within three or four feet of the line between the plaintiff's and the defendant's land, and about eight or nine feet from the plaintiff's house. *Held*, that it was plain that performance of the contract would

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do the damage complained of unless it was guarded against, and that the defendant was bound to see that due care was used to prevent harm. *Wetherbee* v. *Partridge*, 185.

2. In an action against an electric corporation for personal injuries occasioned to the plaintiff by being struck in the eye, as he was driving along a street, by a burnt carbon thrown by A., who, as a servant of the defendant, had removed it from a lamp for the purpose of replacing it by a new carbon, A. testified that he ordinarily dropped the disused pieces of carbon somewhere near the base of the post on which the lamp was; that if there was any good reason why he could not drop them there, he tossed them out into the street; and that he intended to be careful not to drop them on a passer by. He further testified as follows: "I wanted to attract his attention so as to speak to him, and I threw the carbon at the team so as to attract his attention, so that I might speak to him, and not for any business connected with the company." *Held*, that it was a question for the jury whether the explanation given by A. of the purpose which he had in throwing the carbon was true or not. *Held*, *also*, that the evidence of a witness, who testified that A., when taxed by the plaintiff with having through carelessness injured his eye, said, "I am sorry; it was an accident; I did n't mean to do it," was rightly admitted. *Hankinson* v. *Lynn Gas & Electric Co.* 271.

3. Although there are around and at or near the trench in a street sufficient lights, horses, and barriers to warn a traveller of danger, and he sees them, but does not heed them, it cannot be said, as matter of law, that he thereby assumes the risk of falling into the trench, of the existence of which he is or may be ignorant. *O'Neil* v. *Hanscom*, 313.

4. At the trial of an action for personal injuries caused by a pail of sand falling upon the plaintiff's head as he was walking upon a street, and coming out from under a railroad bridge in the possession of the defendant railroad, there was testimony that there was more or less of a practice on the part of people living in the neighborhood to walk across the bridge, although they were trespassers, and it also appeared that the witness of the accident who went at once up to the track saw no one there, except a switchman coming toward the bridge from a switch house. *Held*, that while there was only inference to show who was responsible for the fall, the jury would have been warranted in inferring that it was the defendant, and that the question should have been submitted to them. *Lowner* v. *New York, New Haven, & Hartford Railroad*, 166.

5. If, in an action against a street railway company for causing the death and for the conscious suffering of the plaintiff's intestate, who was a motorman, the most natural inference from the facts and the evidence is that he was running his car in the daytime at a high rate of speed until the other car, which he had reason to expect the coming of on the same track, was close upon him, and there is nothing tending to show that, immediately before he tried to stop his car, he was exercising any care in reference to the known risk of a collision, he was not in the exercise of due care, and a verdict was rightly directed for the defendant. *Hudson* v. *People's Street Railway*, 23.

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6. If, at the trial of an action for personal injuries occasioned to the plaintiff by a defective tread on the stairs of the defendant's building, the jury would be warranted in finding that the stairway was constructed for the use in common of the persons who worked in that part of the building where the plaintiff worked, and that the plaintiff had been so informed by the authority of the defendant; that at the time of the accident the plaintiff was rightfully passing over it and in the exercise of due care; that the stairway was not in existence at the time the plaintiff or his employer, who was a tenant of the defendant, first began to occupy the building, but was constructed several months afterwards and some weeks prior to the accident; that at the time of the accident it was in a defective condition, and that the accident was due to this condition; that it was a part of the building in which the tenants had only a right of passage in common, and that the control of it was retained by the defendant; that the defendant knew or ought to have known of the defective condition in time to repair, and that his failure to repair was negligence, the defendant may be held answerable. *Harrinson* v. *Jelly*, 292.
7. At the trial of an action for injuries occasioned by an alleged defective step on the side of a locomotive engine upon which the plaintiff, an experienced brakeman in the employ of the defendant in obedience to an order of the conductor under whose direction he was working, stepped while the engine was in motion, the judge properly instructed the jury that the plaintiff must show that he was in the exercise of due care; that if he undertook to get on the side step of a moving engine he should have taken such a position as due care required of a prudent person in view of the danger to be apprehended from a misstep or any mistake in obtaining a foothold upon the engine; and that if, knowing that there was a safer way to ride upon the engine, he placed himself unnecessarily and without the prudence of an ordinarily careful man in a dangerous position and thereby contributed to the injury, he would not be entitled to recover. *Powers* v. *Boston & Maine Railroad*, 466.
8. In an action against a street railway corporation under St. 1886, c. 140, for causing the death of a person who, while in the act of boarding a car, which had stopped, was thrown to the ground by reason of the conductor starting the car too quickly, the judge instructed the jury, as requested, that there was no evidence that the deceased lost his life by reason of the unfitness of the defendant's servants, and then added, "except so far as you may think their conduct on this occasion shows unfitness." *Held*, that the defendant had good ground of exception. *Gordon* v. *West End Street Railway*, 181.
9. If a person first attempts to get upon a street car after it has started, the question whether he was negligent is for the jury, in an action for injuries caused by being thrown from the car. *Ibid.*
10. A woman, having good sight and hearing, and intending to take a train for another station, attempted in the daytime to cross from one side of a railroad station to the other, where she could take the train, from which station there was an unobstructed view of the track to the south for nearly half a mile, and was struck by an express train coming from the south

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which did not stop there, and injured. In an action for her injury, she testified that she looked up and down the track, but did not not see or hear anything of the train which struck her. *Held*, that she failed to show that she was in the exercise of due care; and that the fact that the baggage master at the station told her that the train which she intended to take would be along in six minutes and to go across to the other side, did not justify her in assuming that she could cross safely. *Roberts* v. *New York, New Haven, & Hartford Railroad*, 296.

11. If, in an action for personal injuries occasioned to the plaintiff by being caught in an elevator, there is evidence that the plaintiff had given a signal for the elevator to come to the floor where he was waiting and that the defendant, operating the elevator himself, opened the door and asked the plaintiff to step in and that he thereupon attempted so to do, that the floor of the car was then six or seven inches above the floor on which the plaintiff stood, and was only two inches thick, and that the car was of such dimensions that when its floor was at the same level as the floor of the hall there was a considerable open space between the threshold of the door giving access to the elevator and the floor of the car, the questions of the care or negligence of both plaintiff and defendant are for the jury. *Sullivan* v. *Marin*, 422.

12. At the trial of an action for personal injuries it appeared that workmen who were fitting up the defendant's vessel with sheep-pens had placed an unfinished trough near a hatch, and that the plaintiff, who was coming up a ladder, took hold of the trough on reaching the hatch and the trough yielded and fell. The trough did not appear to have been put there for the use he made of it. If the evidence showed that the plaintiff's ordinary mode of egress was barred, which was doubtful, it did not appear that he could not get out without using the trough as he did, and even if that had appeared, still he knew that the work was unfinished. *Held*, that the plaintiff relied upon the trough at his own risk. *Gibbons* v. *British & North Atlantic Steam Navigation Co.* 212.

13. At the trial of an action for personal injuries occasioned to the plaintiff by falling from a staging, which had just been built of new material under the direction of the defendant, and which was such as was commonly used for the purpose, it appeared that the plaintiff, who was a carpenter of experience, assisted in building it and made no objection to its sufficiency, and that while he was upon it and in the act, with a fellow workman, of removing the gutter from the building "the gutter threw him back, and with the swinging and shaking of the staging he let the gutter go, in trying to save himself or to get hold of the building, which he could not do, and fell to the ground." The staging remained standing, and there was evidence that a stay to one of the upright posts was broken, how or when not appearing, and that a piece of split wood from the wood pile was put under one of the posts; but it did not appear that either had anything to do with the accident. *Held*, that the plaintiff could not recover. *McLean* v. *Cole*, 5.

14. In an action for personal injuries caused by a collision between a bicycle ridden by the plaintiff and a horse and carriage driven by the defendant,

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the plaintiff having passed A.'s team going in the same direction before the collision, and the evidence upon the question whether the plaintiff or the defendant was complying with the rule of the road, and as to the speed at which the defendant was driving, being conflicting, the defendant is not entitled to have the jury instructed that "if the plaintiff came round from behind A.'s team and the defendant had not the opportunity to perceive the plaintiff until it was too late to stop or change the direction of the defendant's horse, the defendant would not be liable." *Jones* v. *Shattuck*, 415.

15. At the trial of an action for personal injuries caused by a collision between a bicycle ridden by the plaintiff and a horse and carriage driven by the defendant, the request for a ruling that "if the plaintiff was travelling on his wheel at a rate faster than seven miles an hour just before and up to the instant of the accident, and that was one of the causes of the accident, he was not in the exercise of due care," is in conflict with St. 1894, c. 479, and is rightly refused. *Ibid.*

16. A person who was driving a horse attached to an ordinary wagon on a street in a town that crossed another street on which were an electric railway and also a row of trees which obstructed the view for some distance easterly from the corner of the streets, when within about sixty feet of the corner looked both ways to see if a car was coming; but, without listening for a car which might have passed behind the trees before he looked, he drove at the rate of four or five miles an hour up to the crossing and collided with a car going west at the rate of twelve to sixteen miles an hour, and was injured. *Held*, that he was guilty of contributory negligence, which precluded him from maintaining an action against the railway corporation for his injury. *Kelly* v. *Wakefield & Stoneham Street Railway*, 331.

17. If an action for personal injuries, occasioned to the plaintiff by being thrown from an electric car by reason of its coming into collision with the rear end of another car, rests entirely upon evidence of negligence of the conductor after the trolley came off, and this negligence was nearer to the accident in point of time and more closely connected with it as a cause than the throwing off of the trolley, a request for instructions that "the proximate cause of the collision or contact of the two cars was the throwing off by a passenger of the trolley of the first car, and the plaintiff cannot recover because of any injury to her as the result of the collision," is rightly refused. *Blanchette* v. *Holyoke Street Railway*, 51.

18. In an action for personal injuries, occasioned to the plaintiff by the collision of two electric cars, a finding that the gross negligence of the conductor of the forward car was the cause of the collision is unnecessary to the decision of the case; it is sufficient to find negligence. *Ibid.*

19. In an action for personal injuries, occasioned to the plaintiff by being thrown from an electric car by reason of its coming into collision with the rear end of another car, it appeared that the place of the accident was between a park on a mountain and a street in a city, that the tracks of the railroad ran through woods on a down grade with frequent curves, the curve just before the place of the accident being of such a kind that

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the motorman of the second car could see only about one hundred and fifty feet ahead, that a light rain had fallen and the tracks were very slippery, so that the brakes would not hold well, that the second car left two minutes after the first, that all this was known to the conductor of the first car, and yet when the trolley came off, instead of letting his car go by its own momentum down the grade, he signalled to stop it, and when it stopped after going some distance, instead of giving warning to the other car which was approaching from behind, he proceeded to get on the top of the car to adjust the trolley, and the collision occurred. *Held*, that there was evidence to warrant a finding of negligence on the part of the conductor. *Blanchette* v. *Holyoke Street Railway*, 51.

See ACTION, 3–5; CITY; EMPLOYERS' LIABILITY ACT; EVIDENCE, 6–16; HIGHWAY; MASTER AND SERVANT; PASSENGER; PRINCIPAL AND SURETY; RAILROAD, 2; TRIAL, 5, 10–12.

NEW TRIAL.

At the trial of a petition for an assessment of the damages caused by taking land near the junction of two streets in a city, the evidence was conflicting as to whether or not the streets were on the same level at such junction. After verdict, the petitioner moved for a new trial, on the ground of newly discovered evidence, and filed with the motion a photograph showing the grades of the locality in question, accompanied by affidavits of the photographer and a civil engineer, stating that the photograph was a correct representation of the locality, and that the grades were on the same level; also other affidavits, stating that the buildings on the petitioner's land had been removed before the time when an expert witness for the respondent testified at the trial that he was inside of them. The judge found that the photograph was discovered after the trial, and that the expert witness was mistaken in his testimony as to when he saw the buildings; and denied the motion. *Held*, that it did not appear that the judge exceeded his powers in refusing a new trial. *Freeman* v. *Boston*, 20.

See SUPERIOR COURT.

NOLO CONTENDERE.

See EVIDENCE, 27.

NOTICE.

See APPEAL, 5; ASSIGNMENT; CONSTITUTIONAL LAW, 2; EMPLOYERS' LIABILITY ACT, 3; EQUITY, 3; JUDGMENT, 3; POOR DEBTOR; TOWN, 2.

NULLITY OF MARRIAGE.

1. The concealed existence of a venereal disease know as "syphilis," in one of the parties to a marriage which has been consummated, is not a sufficient ground for a decree of nullity of marriage. *Vondal* v. *Vondal*, 383.

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2. A woman, whose husband, by whom she had a child, had procured a divorce from her in another State, became a *bona fide* resident of this Commonwealth, where she became pregnant by another man. In a conversation between them respecting marriage, she represented to him that she was unmarried, that she had never been married, that she had never before been in the family way, and that she had never had sexual intercourse with any one other than him. She gave birth to a child, of which he acknowledged the paternity, and afterwards they were married here. Subsequently he learned of the earlier marriage and that the offspring was living, but, upon being told that the first husband had died before her second marriage, he continued to cohabit with her. Later, upon learning that the first husband was living and had been divorced from his wife, he ceased to cohabit with her, and brought a libel for a sentence of nullity of the marriage. *Held*, that no such fraud had been practised upon him as to entitle him to a decree. *Donnelly* v. *Strong*, 157

OFFICE.

See Bond, 1.

OFFICER.

See Conversion; Everett; Return; Veterans' Preference Act.

OPTION.

See Broker, 3.

ORDER.

See Contract, 3; Court of Registration; Mechanic's Lien, 6; Superior Court.

ORDINANCE.

In an action by the city of Boston, a book was produced which purported on its title-page to be the "Revised Ordinances of 1895 of the City of Boston, as passed and approved December 14, 1885, with amendments thereto, passed and approved to May 1, 1886, . . . published by order of the City Council." Upon the next page appeared the statement of the order for printing approved February 10, 1886, and at the end an attestation signed by the city clerk. *Held*, that no error appeared in the admission of the ordinance. *Boston* v. *Coon*, 283.

See Ice, 6.

PARENT AND CHILD.

See Evidence, 14, 15.

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PARK.

See EMINENT DOMAIN.

PARTIES.

See ADMINISTRATOR; COVENANT; EMPLOYERS' LIABILITY ACT, 2; ESTATES OF PERSONS DECEASED, 6.

PARTNERSHIP.

1. In an action on a promissory note signed by A., one member of a firm, and indorsed by the firm, and which was given for a loan of money negotiated by B., if there is evidence that statements were made by the firm to B. to be transmitted and which were transmitted by him to the lender, which statements prove the plaintiff's case, the defendants are not entitled to a ruling that "no statements were ever made by A. to the plaintiff touching the note in suit, according to the plaintiff's case, and the partnership cannot therefore be bound." *Reed* v. *Bacon*, 407.
2. The holder of a promissory note bearing the valid indorsement of a partnership made by one partner may prove it against both the latter's estate and that of the firm in insolvency. *Ibid.*

See ACTION, 1.

PASSENGER.

A person is a passenger if a street car has stopped for him and he is in the act of getting aboard when the car starts. *Gordon* v. *West End Street Railway*, 181.

See NEGLIGENCE, 8, 9, 17–19.

PATENT.

In this case, which was a suit in equity by a stockholder in a corporation to compel an inventor to assign to the corporation certain inventions and patents, and to repay to it money voted to him in consideration of a conveyance by him, the evidence warranted a finding that there was no intention to defraud the corporation; but the bill was dismissed without prejudice to the right of any stockholder to claim that the inventions and patents were the property of the corporation. *Gay* v. *Fair*, 521.

See CONTRACT, 4; EQUITY, 2, 13.

PAYMENT.

See ASSIGNMENT; CONTRACT, 4; FORCIBLE ENTRY AND DETAINER, 4; MORTGAGE, 4; WRIT OF ENTRY, 1.

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PENALTY.

See BOND, 2.

PERJURY.

1. If the defendant in a criminal case offers himself as a witness, he may be asked if he has ever been arrested before the arrest on the charge for which he is then on trial, if he has ever been convicted of any offence, and if he has ever served a sentence in prison or for a crime; and if he answers such questions falsely, he may be convicted of perjury. *Commonwealth* v. *Johnson*, 152.
2. An indictment for perjury, in answering falsely certain questions asked for the purpose of showing a previous conviction of crime, need not set forth that when the questions were asked a copy of a previous conviction had been offered in evidence or was in the possession of the District Attorney. *Ibid.*

PERSONAL PROPERTY.

See CONVERSION; DECLARATION, 2; EVIDENCE, 17, 18; MECHANIC'S LIEN, 1; MORTGAGE, 1; PLEDGE.

PHOTOGRAPH.

See NEW TRIAL.

PHYSICIAN.

1. At the trial of a complaint for holding one's self out as a physician and surgeon without being registered according to law, a ruling that if the defendant held himself out as an eye specialist he held himself out as "one who devoted himself to a branch of the healing art, which is the profession of the physician and surgeon," and that "if the defendant held himself out as an eye specialist he held himself out as a physician and surgeon within the meaning of the statute," is correct. *Commonwealth* v. *St. Pierre*, 48.
2. At the trial of a complaint for holding one's self out as a physician and surgeon without being registered according to law, the burden is on the defendant to show that he is a registered physician, if he relies on such a justification; and this applies where the absence of a license is made part of a description of the offence. *Ibid.*
3. If a complaint charges the defendant with holding himself out as a physician and surgeon without being registered according to law, proof that he acted either as a physician or surgeon is sufficient to support the complaint. *Ibid.*

See EVIDENCE, 5.

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PLEADING.

See COMPLAINT, 2; DECLARATION; EQUITY, 8, 11, 13; EXCEPTIONS, 4; VARIANCE.

PLEDGE.

1. An unauthorized sale of pledged property by the pledgee does not cause him to lose his lien and render him liable for the value of the property, if no damage is sustained by the pledgor. *Whipple* v. *Dutton*, 365.
2. A pledgee is precluded from buying at a foreclosure sale of the property pledged, whether the sale is held under Pub. Sts. c. 192, §§ 10, 11, or under the contract of pledge or otherwise. *Lord* v. *Hartford*, 320.
3. The doctrine that where a pledgor seeks to follow the pledged property bought in by the pledgee and to assert title to it in the hands of a third person the sale will be treated as voidable only, has no application to an action by the pledgor to recover from the pledgee damages caused by a wrongful sale of the property pledged. *Ibid.*

See ASSIGNMENT; INSOLVENCY.

POOR DEBTOR.

A notice to a debtor to appear and submit to an examination touching his estate, under Pub. Sts. c. 162, § 18, upon an application for an order for his arrest, may be served by a constable. *French* v. *Goodnow*, 451.

PRACTICE.

See ABSENT DEFENDANT; AGREED FACTS; APPEAL; BASTARDY PROCESS; CIVIL ACTION; COMPLAINT, 1; COURT OF REGISTRATION; DECLARATION, 1, 3; DEPOSITION; EQUITY, 8–14; EVIDENCE, 27; EXCEPTIONS; EXECUTION; FORCIBLE ENTRY AND DETAINER, 2; JUDGMENT; MECHANIC'S LIEN; PHYSICIAN, 2; PROBATE COURT, 2; REDEMPTION; REPLEVIN; SCIRE FACIAS; SENTENCE; STAY OF PROCEEDINGS; SUPERIOR COURT; TAX, 3; TRIAL; TRUST AND TRUSTEE, 1, 2; TRUSTEE PROCESS; WRIT OF ENTRY; WRIT OF ERROR.

PRESCRIPTION.

See DEVISE AND LEGACY.

PRINCIPAL AND AGENT.

1. There is a distinction between transactions where the emphasized object is an advance of money, whether to be repaid in money or goods, and those where the object is a sale and where an advance, if made, is only incidental to the purchase and not its end. To receive an advance of the latter sort may be within the power of an agent not authorized to

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borrow, so far that if the goods are not delivered the advance can be recovered because of the failure of the consideration. *American Mining & Smelting Co.* v. *Converse*, 449.

2. If A. is employed by B. to sell machines made by the latter, and is to be paid as a commission the difference between the selling price which is fixed by him and a price named by the defendant, and B. agrees not to sell machines to A's customers without his consent at prices less than those named by him to them, and after A. has brought the machine to the notice of C., B. sells to C. an incomplete machine for a price a little more than that named by A. for a complete machine without his consent, thus depriving him of a portion of his commission, in an action by A. against B. for breach of the agreement, B. is not entitled to have the jury instructed "that there was no evidence that the machine could have been sold for more than the price for which the defendant sold it, and that if they should find for the plaintiff their finding must be for no more than nominal damages." *Buffum* v. *York Manuf. Co.* 471.
3. At the trial of an action of contract to recover certain commissions under an alleged oral agreement with the president of the defendant corporation, it appeared that the president was authorized to make a certain written agreement with the plaintiff, and that payments were made under it by the corporation, the agreement containing the clause, "Any transaction entered into in other countries shall be subject to another agreement;" that the oral agreement declared on relative to sales in other countries followed the next year, the president being still the ostensible agent of the defendant, and that the plaintiff was entitled to a commission on a certain sum representing sales in those countries, if he could recover anything. The president did not deny making the oral agreement, but testified that he did not remember any such conversation. *Held*, that enough appeared to warrant a finding that the president was authorized to make the contract declared on. *Scribner* v. *Flagg Manuf. Co.* 536.

See BOND; BROKER; CONSTITUTIONAL LAW, 7; EVIDENCE, 1, 3, 25; SAVINGS BANK; TOWN, 2; WAIVER.

PRINCIPAL AND SURETY.

Negligence of the officers of a town, in not discovering at an earlier date the defalcation of its collector of taxes, will not discharge the sureties on his bond. *Winthrop* v. *Soule*, 400.

See EVIDENCE, 26; STAY OF PROCEEDINGS.

PRIVILEGE.

See ESTATES OF PERSONS DECEASED, 5; LIBEL, 2.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

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PROBATE COURT.

1. The equity jurisdiction given by statute to the Probate Courts over all cases relating to trusts created by will and the termination thereof is a concurrent jurisdiction shared by the Superior Court and by this court; and while the fact that in the records of the Probate Courts are found the wills under which such trusts arise and the inventories and accounts of the trustees, with their official bonds, the proceedings under which they were appointed and other matters affecting the trust, may have been a reason for conferring this concurrent jurisdiction, it does not enlarge that jurisdiction or enable those courts to entertain any bill which could not also be entertained by the Superior Court or by this court; nor does it enable a Probate Court upon its equity side to do any of those things upon a bill in equity with reference to such a trust which can be done by a Probate Court under its probate jurisdiction only. *Green* v. *Gaskill*, 265.
2. Trustees appointed by a Probate Court, as well as guardians, administrators, and executors so appointed, have a right to have their accounts adjusted and the amounts due to or from them as trustees determined in the Probate Court, on its probate side and in the usual probate proceedings, and they cannot be compelled first to render their accounts or made to pay over the fund, by proceedings in equity or at law, save after and in pursuance of such an adjustment and determination on the probate side of the court. *Ibid.*

See APPEAL, 3; EQUITY, 1; LIMITATIONS, STATUTE OF.

PROMISSORY NOTE.

1. If a promissory note bears an indorsement when delivered to the payee, an indorsement made by him when he puts the note in the bank for collection does not make him the first indorser. *Reed* v. *Bacon*, 407.
2. In an action on a promissory note payable in two years, given in payment for the good will in a milk route and personal property used in connection therewith, the maker also agreeing to buy all his milk from the payee at a certain rate a can, which agreement he kept, and paid bills rendered monthly for it at that rate, evidence of an oral agreement that when the note was settled a discount of a certain sum a can on all milk bought after the date of the note should be made and applied thereon contradicts the written agreement contained in the promissory note and is inadmissible; and the statute of frauds, Pub. Sts. c. 78, § 1, cl. 5, is a defence to a declaration in set-off for the amount of such discount. *Kelley* v. *Thompson*, 427.

See ACTION, 1; ASSIGNMENT; EVIDENCE, 1, 2; FORCIBLE ENTRY AND DETAINER, 4; INSOLVENCY; MORTGAGE, 2–4; PARTNERSHIP; VARIANCE.

PROXIMATE CAUSE

See NEGLIGENCE, 17.

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PUBLIC POLICY.

Racing for a cup which was offered as a prize for a series of bicycle races between the members of three specified clubs, and was purchased by the voluntary subscriptions of persons not members of any of the three associations, is not betting, gambling, or wagering, and is not against public policy. *Wilkinson* v. *Stitt*, 581.

RAILROAD.

1. The provision of Pub. Sts. c. 112, § 160, requiring railroad corporations to maintain guards at every structure, any portion of which crosses the railroad above the track, does not apply to the cornice of a roof over a station platform about a foot and a half from the line of the nearest rail and about fourteen and a half feet above the rail. *Quinn* v. *New York, New Haven, & Hartford Railroad*, 150.
2. If, after a car has passed from the hands of one railroad into those of another and before it has reached the place where an accident occurs, it has passed a point at which the cars are inspected, the responsibility of the first railroad for a defect in the car is at an end. *Glynn* v. *Central Railroad*, 510.

See Action, 3; Employers' Liability Act, 1, 2; Evidence, 7, 8; Grade Crossing; Master and Servant, 2–5; Negligence, 4, 7, 10; Railroad Commissioners; Trial, 12.

RAILROAD COMMISSIONERS.

1. *It seems*, that a bill in equity under St. 1898, c. 578, § 25, may be maintained to the extent of revising the rulings of the board of railroad commissioners. *Daniels* v. *Commonwealth Avenue Street Railway*, 518.
2. An extension of the location of the tracks of a street railway company, approved by the board of railroad commissioners, will not be declared void upon a bill in equity filed under St. 1898, c. 578, §§ 13, 15, for the reason that it is granted over the tracks of another street railway company continuous with the first, the use of which by the defendant is permitted under a contract with the other company, approved by the railroad commissioners, and sanctioned, but not expressly authorized under the Pub. Sts. c. 113, § 48, by the board of aldermen of the city in which the tracks are located; nor for the reason that the location granted is temporary only, and is to terminate upon the abolition of a crossing at grade of a railroad and a way over which it is intended that the defendant's track shall subsequently be laid. *Ibid.*

REAL ESTATE.

See Action, 4, 5; Constitutional Law, 2, 3; Court of Registration; Deed; Devise and Legacy; Eminent Domain; Equity, 3; Estates of Persons Deceased, 1; Evidence, 20, 21; Insurance, 2; Mechanic's Lien; Mortgage, 2–4; Negligence, 1, 6; New Trial; Redemption; Return; Tax, 1–3; Writ of Entry.

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RECEIVER.

See BANK; EQUITY, 10, 11.

RECORD.

See APPEAL, 4, 7; ATTESTATION; EVIDENCE, 27; MASTER IN CHANCERY, 2; SCIRE FACIAS, 2.

REDEMPTION.

If, on a bill in equity to redeem real estate from a mortgage, no exception was taken to the findings of the master which the plaintiff seeks to have reviewed by this court, there is no question properly before it, and the decree of the Superior Court must be affirmed; but, the time allowed for redemption having expired pending the appeal, that court may, if it sees fit, allow a further time for that purpose. *Roosa* v. *Davis*, 117.

See DEED, 3; EQUITY, 3.

REGISTRATION.

See CONSTITUTIONAL LAW, 2; CONTRACT, 1; COURT OF REGISTRATION; EVIDENCE, 5; PHYSICIAN, 1.

REGISTRY OF DEEDS.

See MECHANIC'S LIEN, 2, 3, 7.

RELEASE.

See DEED, 3.

RENT.

See CONSTITUTIONAL LAW, 4; EVIDENCE, 3.

REPLEVIN.

If, in an action on two bonds given in replevin suits, the returns on the replevin writs do not show to which each bond applies, it is open to the plaintiff to show what the fact is. *McManus* v. *Donohoe*, 308.

See TRIAL, 15.

REPORT.

See COURT OF REGISTRATION; EXCEPTIONS, 8; MASTER IN CHANCERY, 1, 5.

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RESTRICTION.

See DEED, 1.

RETURN.

It is not essential to the validity of an officer's return upon an execution levied on real estate standing in the name of another, that the word "fraudulently" should be inserted therein. *Berry* v. *Gates*, 373.

See REPLEVIN.

RULE OF COURT.

See SUPERIOR COURT; TRIAL, 1.

SALE.

See COMPLAINT, 2; DEED, 3; EXECUTION; ICE; MECHANIC'S LIEN, 4–6; MORTGAGE, 3, 4; PLEDGE, 2, 3; PRINCIPAL AND AGENT, 1, 2; TRIAL, 16; WAIVER.

SAVINGS BANK.

The president and treasurer of a savings bank, in the absence of a by-law or vote of the trustees, have no authority to purchase or contract in the name of the bank for work and material to be furnished in completing buildings on land subject to a building-loan mortgage; and the bank is not estopped, in an action against it for materials furnished, to deny the debt, although the transaction took the form of a sale of the materials to the bank. *Slattery* v. *North End Savings Bank*, 380.

SCHOOL.

1. If a person employed to teach school in a town, before opening the school, met the school committee and was examined, and they authorized their chairman to sign the certificate required by Pub. Sts. c. 44, § 29, to be obtained in duplicate, one of which is to be deposited with the selectmen before any payment is made to the teacher, and the chairman then promised to give the certificate to the teacher before school should open, the facts that he did not obtain the certificate in duplicate, and that the certificate which he did get was not obtained and filed with the selectmen until two days after the school opened, will not prevent him from recovering compensation, in an action against the town, for services rendered after so obtaining and depositing the certificate. *Libby* v. *Douglas*, 128.
2. It is no defence to an action against a town for salary as a teacher for a certain period, that during that time the school was closed by the school committee because of the prevalence of a contagious disease in the town, if the plaintiff, who was employed to teach during the school year for a certain sum payable in monthly instalments, kept himself in readiness to resume work, at the request of the committee. *Ibid.*

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SCIRE FACIAS.

1. An administrator is chargeable on *scire facias* for funds of the estate which came into his hands after the service of a trustee writ upon him in the original action. *Jewett* v. *Morrison*, 161.
2. If the record of a *scire facias* recites that the judge found for the plaintiff and charged the defendant, who, as administrator, was summoned as trustee in the original action, in a certain sum, and ordered judgment for that amount, "it having appeared at the hearing that funds came to the hands of the administrator after the service of the trustee process," the finding implies that there was a hearing at which the amount was determined. *Ibid.*
3. The rule that the answer of a trustee on *scire facias* and in the original action are to be taken as true, does not apply where the defendant, who is an administrator, does not answer as to the amount which he received after the service of the writ upon him in the original action. *Ibid.*

SEAL.

See ATTESTATION, 1.

SENTENCE.

On December 3, 1897, a person, having been found guilty of obtaining property by false pretences on October 31, 1894, was immediately sentenced to imprisonment in the state prison for not less than three or more than five years. After announcing the sentence the clerk said, "Mr. Sheriff, the prisoner at the bar is in your custody under sentence." Exceptions having been taken, the judge soon after, at the defendant's request, made an order staying the execution of the sentence, and the prisoner, who had remained in the court-room with the sheriff, was admitted to bail. No transcript under Pub. Sts. c. 215, § 25, was ever delivered or made out. The exceptions, having been argued in this court in October, 1898, were overruled in November, 1898. On the receipt of the rescript the defendant was not present in the Superior Court and was defaulted. A capias was issued, on which he was arrested and brought before the court on January 16, 1899, at a regular sitting for the transaction of civil business, the District Attorney moving that such sentence should be imposed as would be applicable, having informed the judge that the original sentence was under St. 1895, c. 504, which had been held by this court inapplicable to offences committed before January 1, 1896. The judge, against the defendant's objection and subject to his exception, sentenced him to a term of three years in the state prison, the first day of which was to be in solitary confinement, and the balance at hard labor. *Held*, that the judge had the power to modify the original sentence and make it conform to the law, and that the objections that the sentence could not be imposed at a sitting of the court for the transaction of civil business, and that the

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judge was engaged in the transaction of civil business a little before and a little after imposing it, could not avail. *Commonwealth* v. *O'Brien*, 37.

See EVIDENCE, 27; INDICTMENT.

SERVICE.

See ABSENT DEFENDANT, 1, 4, 5; POOR DEBTOR; SCIRE FACIAS.

SET-OFF.

See ABSENT DEFENDANT, 1–3; PROMISSORY NOTE, 2.

SEWER.

See CONSTITUTIONAL LAW, 4; EVIDENCE, 20, 21.

SIGNATURE.

See ATTESTATION; FRAUDS, STATUTE OF, 2.

SLANDER.

See LIBEL.

STATUTE.

See ABSENT DEFENDANT; APPEAL, 4–6; ATTESTATION; BASTARDY PROCESS, 1; BUILDINGS; COMPLAINT, 2; CONSTITUTIONAL LAW; COURT OF REGISTRATION; DECLARATION, 1; DEPOSITION; DIVORCE; EMINENT DOMAIN; EMPLOYERS' LIABILITY ACT, 1–3, 6–8; EQUITY, 2; ESTATES OF PERSONS DECEASED, 1–4; EVERETT; EVIDENCE, 10, 21; FORCIBLE ENTRY AND DETAINER; FRAUDS, STATUTE OF; GRADE CROSSING; HIGHWAY; ICE, 1, 2, 4–6; INDICTMENT; INSOLVENCY; LIMITATIONS, STATUTE OF; MANDAMUS; MASTER AND SERVANT, 2, 9; MECHANIC'S LIEN, 1, 2, 4–6; MORTGAGE, 1, 4; NEGLIGENCE, 8, 15; PHYSICIAN, 1; PLEDGE, 2; POOR DEBTOR; PROMISSORY NOTE, 2; RAILROAD, 1; RAILROAD COMMISSIONERS; SCHOOL, 1; STAY OF PROCEEDINGS; TAX, 1, 2, 4, 6; TOWN, 1; TRUST AND TRUSTEE, 1, 2; VETERANS' PREFERENCE ACT; WRIT OF ENTRY.

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1898, §§ 1197, 1208, 2612, 3102, 3116, cls. 1–3; 3186, 3196.	Unknown Defendant	80, n.

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STAY OF PROCEEDINGS.

After a verdict and before judgment the defendants in an action were adjudicated bankrupts under U. S. St. of July 1, 1898, and thereafter they filed a suggestion of that fact and moved that all proceedings be stayed. This motion was denied and a special judgment entered to enable the plaintiff to proceed against the sureties upon a bond, given more than four months before the bankruptcy, to dissolve an attachment. *Held*, that the court had power to overrule the motion for a stay, and to direct the entry of a special judgment. *Rosenthal* v. *Nove*, 559.

STREET.

See HIGHWAY.

STREET RAILWAY.

See EVIDENCE, 12, 13; HIGHWAY, 3, 5; NEGLIGENCE, 5, 8, 9, 17–19; PASSENGER; RAILROAD COMMISSIONERS, 2.

SUPERIOR COURT.

It is within the power of the Superior Court, in a case appealed from a police court, the appeal having been dismissed and afterwards the case having been continued for judgment to await proceedings on mandamus, to allow, after the session has adjourned without day and before the first Monday of the following month, when by the 27th rule of that court judgment may be entered in all actions ripe for judgment under a general order of the court, motions to vacate an order dismissing the appeal, to file an amended record showing that the appeal had been seasonably made, and to grant a new trial. *Dalton-Ingersoll Co.* v. *Fiske*, 15.

See ABSENT DEFENDANT, 3; AGREED FACTS; APPEAL, 4–6; BASTARDY PROCESS, 2; COMPLAINT, 1; DECLARATION, 3; DEPOSITION; GRADE CROSSING, 1; MECHANIC'S LIEN, 4, 6; PROBATE COURT, 1; REDEMPTION; TRIAL, 1.

SUPREME JUDICIAL COURT.

See AGREED FACTS; APPEAL, 1–4, 7; COURT OF REGISTRATION; DECLARATION, 3; EXCEPTIONS; PROBATE COURT, 1; REDEMPTION.

SURETY.

See PRINCIPAL AND SURETY.

TAKING.

See EMINENT DOMAIN.

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TAX.

1. The occupancy contemplated by Pub. Sts. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting from taxation the real estate belonging to literary institutions "occupied by them or their officers for the purposes for which they were incorporated," means something more than that which results from ownership and possession on the part of the institution, or the use of the property for investment purposes. It must have, or be supposed to have, direct reference to the purposes for which the institution was incorporated, and must tend, or be supposed to tend, directly to promote them. *Phillips Academy* v. *Andover*, 118.

2. Real estate owned and provided by a college without rent or compensation, or a lease or any agreement for a fixed term for the use of students who club together for the purpose of obtaining, with the assistance of the college, food at cost, also the estate occupied by the president of the college, who pays no rent or other compensation for its use and has no lease of it, and the estate occupied by professors, all of which are kept in order and repair at the expense of the college, most of the lower portions of the houses being used for meetings and exercises connected with the college, and for different purposes incident to the offices and duties of the occupants, and the other portions being used by them and their families as dwellings, the salaries of the professors being fixed at certain sums "and the use of the house" at a sum stated, are all exempt from taxation under Pub. Sts. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465. *Harvard College* v. *Cambridge*, 145.

3. If a part of a tax assessed to a person upon his real estate is valid, although for the balance of the real estate assessed to him he is not taxable, the remedy is by petition for abatement and not by contract for money had and received. *Bates* v. *Sharon*, 293.

4. A life tenant may be taxed as the owner of land under Pub. Sts. c. 11, § 13. *Ibid.*

5. Real estate, occupied by a charitable institution for the purpose for which it was incorporated but owned by a third person, is not exempt from taxation. *Ibid.*

6. At the trial of a petition by the executor of a will for instructions as to the payment of a collateral inheritance tax on the residuary legacies, it appeared that when the testator died he was domiciled at S. in this Commonwealth, and nearly all his estate, consisting of bonds and stock of foreign corporations, a certificate of indebtedness of a foreign corporation, bonds secured by mortgage on real estate in New Hampshire, the makers living in New York, and of cash on deposit with a savings bank and with individuals in Brooklyn, was and had been for many years with his agents in New York. There had been no administration in New York, and the petitioner had taken possession of all the property except the real estate, and had paid all debts and legacies except the residuary legacies, and none of the legacies were entitled to exemption if otherwise liable to the tax. *Held*, that the stocks, bonds, etc., were "property within the jurisdiction of the Commonwealth," within the meaning of St. 1891, c. 425, § 1, and that the

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succession took place by virtue of the laws of this Commonwealth. *Frothingham* v. *Shaw*, 59.

7. The excess of the assets over the liabilities of a national bank at a stated time is of no importance in determining the fair cash value of its shares for the purposes of taxation, where there is sufficient evidence of a sum for which the shares could have been sold on that date. *National Bank of Commerce* v. *New Bedford*, 257.

8. A national bank, at the trial of a petition for the abatement of a tax assessed upon its shares, supported the report of a commissioner that the fair cash value of its shares for the purposes of taxation was their market value as found by him. Subsequently the bank voted to petition for an abatement of the tax for 1897 upon the basis of the difference between the assessed valuation and the fair cash value of its shares based on the cash sales on or about May 1 of that year. The assessors had requested the bank to submit a statement of the price at which its shares were actually sold at the last sale prior to May 1, mentioning that the last quoted sale before that day was at a certain rate, to which the bank made no reply. *Held*, that the bank was not estopped to set up that the fair cash value of its shares for the purposes of assessment was less than the cash sales on or about May 1, 1897. *Ibid.*

See AGREED FACTS; APPEAL, 5, 6; CONSTITUTIONAL LAW, 6; EVIDENCE, 26; TOWN, 1; WRIT OF ENTRY.

TENANT AT SUFFERANCE.

Where an easement only in land is taken by the right of eminent domain, a tenant of the premises who, after the expiration of his lease, remains in occupation is liable as a tenant at sufferance to the owner of the fee. *Devine* v. *Lord*, 384.

See DEED, 2; FORECLOSURE, 2.

TENANT IN COMMON.

See TRUST AND TRUSTEE, 1.

TENDER.

See ASSIGNMENT; WRIT OF ENTRY, 1.

TITLE.

See DEED, 2, 3; WAIVER.

TORTS.

See ACTION, 3–5; EMPLOYERS' LIABILITY ACT; EVIDENCE, 6–16; HIGHWAY; INFANT; MALICIOUS PROSECUTION; MASTER AND SERVANT; NEGLIGENCE; RAILROAD, 2; TRIAL, 5, 10, 11–13.

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TOWN.

1. Where the vote of a town appropriating money for watering streets contains an express reference to St. 1895, c. 186, authorizing such an appropriation, and states that the money is appropriated under that act, the plain meaning of the vote is that the provisions of the act are to be applied in regard to the expenditure that is authorized, and in the absence of anything limiting the amount of the assessment, the fair inference is that the whole cost is to be assessed on the estates which abut upon the streets that are watered. *Phillips Academy* v. *Andover*, 118.
2. If the fact that a town is so populous that its legal voters cannot be warned and assembled in town meeting without expense and great loss of time, whenever it may be necessary for the town to prosecute its rights in court, is matter of common knowledge, it tends to confirm the view that when, by an elaborate chapter of its by-laws, the town provided for a law board of the principal town officers, and authorized them to choose a town solicitor and "to prosecute all litigation to which the town is a party," the town thereby authorized the board to bring suits in the name and behalf of the town; and therefore the bringing of a suit under votes of that board, authorizing the town solicitor to serve notices on the bondsmen of the defaulting town treasurer, giving them two weeks for settlement, and further authorizing the solicitor, if unable to make arrangements towards a settlement, at the end of that time to take legal measures to collect the amount due the town, and the vote engaging counsel for the town in the prosecution, make the action that of the town. *Clinton* v. *Heagney*, 134.

See CONSTITUTIONAL LAW, 5, 6; GRADE CROSSING, 2, 3; PRINCIPAL AND SURETY; SCHOOL.

TRAVELLER.

See EVIDENCE, 6, 12; HIGHWAY, 4; NEGLIGENCE, 3, 14–16.

TRIAL.

1. The judge presiding at a session of the Superior Court announced that he should require the plaintiff in a case, who was in court, to try his case with another case which had been called for trial. The plaintiff's counsel thereupon having withdrawn from the case, the pleadings were read by the defendant's counsel. There was no exception taken by the plaintiff, and no notice given that he did not regard his case as before the jury. After the pleadings had been read the plaintiff in person asked leave of the judge to become nonsuit, but the defendant's counsel refused his assent, and thereupon the judge ordered a verdict for the defendant, all without exception or any intimation that the plaintiff did not understand his case to be before the jury. *Held*, that there was a trial, and that a motion to set aside the verdict was within Rule 46 of the Superior Court,

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requiring a motion for a new trial to be filed within three days after the verdict. *Fitch* v. *Jefferson*, 56.

2. A request for a ruling based upon a fact of which there is no evidence is rightly refused. *Commonwealth* v. *Reid*, 325.
3. A party is not prejudiced by the admission of immaterial evidence which, at the close of the case, the jury is instructed to disregard. *Barker* v. *Mackay*, 485.
4. It is not the duty of the judge presiding at a trial to select the undisputed facts in the case and state to the jury what their verdict should be upon those facts, unless the disputed facts are immaterial to the issue. *Packer* v. *Thomson-Houston Electric Co.* 496.
5. In an action for personal injuries sustained by the plaintiff while employed in the defendant's mill, if the plaintiff testifies that a certain passageway was not a safe and convenient way for use, and the defendant introduces evidence to the contrary, it is not open to the plaintiff to contend that such evidence should be limited to those witnesses who were present while he was employed in the mill, if there is no evidence of any change in the general conditions and character of the way from the time the machinery was placed in the mill to the time of the plaintiff's injury, which occurred within a few months afterwards. *Dolphin* v. *Plumley*, 304.
6. If evidence on a question is in a case without objection, the judge is not bound to limit its effect to a question which is a different issue. *Ibid.*
7. A party is not entitled to single out some of several disputed facts in a case and ask an instruction to the jury upon them. *Ibid.*
8. A request for a ruling based upon a fact of which there is no evidence, or assuming a fact which is in dispute, is rightly refused. *Ibid.*
9. Whether a special question shall be submitted to the jury is a matter in the discretion of the judge, as is also the question whether an account book put in evidence shall go to the jury room. *Boston Dairy Co.* v. *Mulliken*, 447.
10. If the evidence in an action for personal injuries is conflicting on the questions of the plaintiff's due care and the defendant's negligence, the judge rightly refuses to take the case from the jury. *O'Neil* v. *Hanscom*, 313.
11. In an action for personal injuries, a witness, who has been asked what he observed about the plaintiff's condition, how she looked and acted, and how she had appeared since the accident, properly is allowed to testify that he had observed a very sick woman, that she looked like a broken invalid and a very nervous woman, utterly unable to do anything, and that she appeared incapable of talking consecutively. *Ibid.*
12. In an action against a railroad corporation for injuries caused by being struck by a train while crossing the tracks from one side of a station to the other, in which the plaintiff testifies that he noticed a freight train standing on the tracks, it is within the discretion of the judge to exclude evidence as to the situation of freight cars at other times. *Roberts* v. *New York, New Haven, & Hartford Railroad*, 296.
13. After the defendant's counsel, in an action against an attaching officer for the conversion of personal property, had cross-examined the plaintiff

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for about two hours as to the general evidence, and had also examined her in detail in regard to many items of the declaration in such a way as to indicate that little if anything more of importance could be elicited by further examination, the judge informed the counsel that only one hour more would be allowed him for the cross-examination of that witness. *Held*, that this direction appeared to be entirely reasonable. *Munro* v. *Stowe*, 169.

14. In an action on two bonds, the pendency of a previous action upon one of the bonds is pleadable only in abatement, and not having been so pleaded it is not error for the judge to refuse to require the plaintiff to elect which bond he will rely on, especially if the plaintiff states that he will consent to judgment for the defendant for costs in the previous action; and no ground appears in this case on which the plaintiff's right to recover could be limited to one bond if he proved breaches of both. *McManus* v. *Donohoe*, 308.

15. In an action on two bonds given in replevin suits, the parties to both of which are the same, and there being evidence tending to show that each bond was intended to apply to one particular writ, and that there had been a breach of each bond, the defendant is not entitled to a ruling that the plaintiff had failed to prove a breach of the bonds because he was unable to show, except by testimony varying the returns, to which replevin writ each bond related. *Ibid.*

16. If, in an action on a contract to recover compensation for services as a salesman, the defendant, on cross-examination, asks the plaintiff whether he has made the claim that the goods which he was trying to sell for the defendant were defective, and the plaintiff answers that he has made that claim in a certain conversation, and the plaintiff, on re-direct examination, asks the defendant whether the goods were defective or not, with a view of explaining his small sales, and the defendant testifies that they were defective, the plaintiff's answer to the defendant's question on cross-examination does not entitle the latter to put in the rest of the conversation, which is in itself inadmissible, and the plaintiff's question on re-direct examination does not make it competent or enlarge the defendant's right to introduce the conversation in evidence. *Menage* v. *Rosenthal*, 358.

17. At the trial of an action of A. against B. it appeared that B. signed and gave to A., a newspaper publisher, an order in writing requesting him to insert a certain advertisement for one year "for which I will pay the sum of $60. Payable monthly." B. sought to show by oral testimony that A., before the order was signed, agreed to take his pay "in teams." *Held*, that the evidence offered tended to vary one of the express terms of a written contract and was inadmissible. *Held*, *also*, that A. having testified, on cross-examination, that at the time he received the order for advertising, nothing was said about "teams," B. could not contradict him by showing that something was said and what the conversation was. *Merrigan* v. *Hall*, 508.

See Bastardy Process, 1; Evidence, 3, 7, 21, 25; Exceptions; Insurance, 2; Judgment, 3; Physician, 1; Trust and Trustee, 4; Witness; Writ of Error.

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TROVER.

See CONVERSION.

TRUST AND TRUSTEE.

1. Where an estate is devised to trustees to pay the income to A. for life, and on his death it is directed that the trust estate shall be divided into two equal parts, one of which shall go to B. and his heirs in fee, and the other part shall be divided among the testator's heirs at law, the estate, at the death of A., vests in B. and the heirs of the testator, in equal moieties, as tenants in common, and the provisions of the St. of 1898, c. 65, do not apply. *Heard* v. *Trull*, 239.
2. Where the trustees under a will have power to convert personal estate into money, a petition for the protection of the trustees may be maintained under St. 1898, c. 65, which provides for the distribution of trust estates. *Ibid.*
3. A trustee cannot be held liable for a mere error of judgment in making or failing to make an investment unless the error is so gross as to show that he either acted in bad faith or failed to exercise sound discretion. *Pine* v. *White*, 585.
4. In this case, which was a bill in equity to charge a trustee for failure to buy for the trust estate property closely connected with it, which was offered for sale for much less than its value, it cannot be said, in view of the uncertainties disclosed by the testimony and the opportunity that the judge had of seeing the witnesses, that his decision in favor of the defendant was wrong. *Ibid.*

See EQUITY, 2, 4–6, 13; PROBATE COURT.

TRUSTEE PROCESS.

The fund of a mutual benefit association set aside for the payment of death benefits, and paid in by members for that express purpose, cannot be trusteed in an action against the association to enforce a judgment founded on a death benefit certificate. *Palmer* v. *Northern Mutual Relief Association*, 396.

See JUDGMENT, 2; MONEY PAID, 1; MORTGAGE, 1; SCIRE FACIAS.

UNLIQUIDATED DAMAGES.

See ABSENT DEFENDANT, 2.

USAGE.

See EVIDENCE, 13, 22.

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VARIANCE.

Proof of the original promissory note, made as a step in showing the character of a renewal note, will not support a claim of variance under a declaration counting on the renewal note. *Reed* v. *Bacon*, 407.

VERDICT.

See APPEAL, 7; HIGHWAY, 1, 3; NEGLIGENCE, 5; TRIAL, 1.

VETERANS' PREFERENCE ACT.

An assessor is not a veteran holding an office or employment in the public service of the city of Everett within the meaning of St. 1896, c. 517, § 5. *Ayers* v. *Hatch*, 489.

VOTE.

See TOWN, 1.

WAGER.

See PUBLIC POLICY.

WAIVER.

In this case, which was an action of contract, the declaration alleging that the merchandise was delivered to the defendant and by him carried away, with the agreement between him and the plaintiff that the property therein should remain in the plaintiff until the plaintiff had been furnished an order for the amount of the contract price drawn by W. (with whom the defendant had contracted to do a part of the work, W. to furnish the materials therefor) and accepted by the defendant, it was competent for the jury to find that the delivery of the merchandise was a conditional delivery; that the condition had not been waived; that the title in the merchandise had not passed to W., and that as the defendant used the merchandise as his own, he was liable to the plaintiff; and taking evidence that S., the agent of the plaintiff, had conversations with the defendant, in which the defendant promised to pay for the merchandise, in connection with a letter of the plaintiff to the defendant stating that S. advised him that the defendant was the original contractor and that he would see that the plaintiff was paid, and that it would not be necessary to have an order from W., it was a question for the jury whether the promise of the defendant was to pay the debt as a debt of his own, or to pay the debt of W.; and if the jury found from all the evidence that there was a waiver of the condition of an accepted order based on the defendant assuming the debt as his own, they might well find from the conduct of the defendant in using the merchan-

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dise that he agreed to pay for it, although he did not answer the letter. *Brownville Maine Slate Co.* v. *Hill*, 532.

See DECLARATION, 2; ESTATES OF PERSONS DECEASED, 5; MONEY PAID, 2.

WAY.

See HIGHWAY; RAILROAD COMMISSIONERS, 2.

WILL.

See DEVISE AND LEGACY; LIMITATIONS, STATUTE OF; PROBATE COURT, 1.

WITNESS.

When it is objected that by reason of insanity or youthfulness a witness does not understand the nature of the oath and is therefore incompetent, it is the duty of the judge to examine into the question of his competency, and to reject him unless he is satisfied that he is competent. *Commonwealth* v. *Reagan*, 335.

See DEPOSITION; ESTATES OF PERSONS DECEASED, 5; EVIDENCE, 16–21, 25, 28; EXCEPTIONS, 9; PERJURY; TRIAL, 5, 11.

WORDS.

"Accrued." See *Attorney General* v. *Equitable Accident Insurance Association*, 196, 198, 199.

"Actually." See *Phillips Academy* v. *Andover*, 118, 122.

"Actually borrowed." See *McKie* v. *Gregory*, 505, 507.

"And the use of the house." See *Harvard College* v. *Cambridge*, 145, 148, 149.

"Any building or structure upon real estate." See *Forbes* v. *Mosquito Fleet Yacht Club*, 432, 436, 437.

"Any moral misconduct." See *Child* v. *Boyd & Corey Manuf. Co.* 493, 495.

"Any transaction entered into in other countries shall be subject to another agreement." See *Scribner* v. *Flagg Manuf. Co.* 536, 538.

"Argumentative." See *Bliss* v. *Parks*, 539, 546.

"As a public way to be known as Columbia Road." See *Devine* v. *Lord*, 384, 388.

"At the date of the attestation hereunto annexed." See *Commonwealth* v. *Corkery*, 460, 463.

"Being the same premises described in deed." See *Muto* v. *Smith*, 175, 176.

"Be treated and considered as common property, and should be held for the mutual benefit and interest, and belong to and be the property of both the parties concerned." See *Walker* v. *Walker*, 349, 354.

"Cancelled." See *Goodhue* v. *Hartford Fire Ins. Co.* 187, 189.

"Conscious suffering." See *Martin* v. *Boston & Maine Railroad*, 502, 504.

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"Conviction." See *White* v. *Creamer*, 567, 568.
"Cruel and abusive treatment." See *Bonney* v. *Bonney*, 7, 8.
Damages "recoverable by law by abutters on ways discontinued by towns." See *Natick Gas Light Co.* v. *Natick*, 246, 250, 252.
"Debtor." See *Hale* v. *Leatherbee*, 547, 551.
"Decision." See *Welsh, petitioner*, 68, 70.
"Disregards." See *National Bank of Commerce* v. *New Bedford*, 257, 260.
"Due process of law." See *Tyler* v. *Court of Registration*, 71, 74.
"During such further time as he may continue to hold said office." See *O'Brien* v. *Murphy*, 253, 256, 257.
"Elective." See *Ayers* v. *Hatch*, 489, 491.
"Fair cash value." See *National Bank of Commerce* v. *New Bedford*, 257, 262.
"For a period of ten years." See *Welsh, petitioner*, 68, 70.
"Forge." See *Boston* v. *Sarni*, 357, 358.
"For the purposes for which they were incorporated." See *Phillips Academy* v. *Andover*, 118, 122; *Harvard College* v. *Cambridge*, 145, 146.
"Fraudulently." See *Berry* v. *Gates*, 373, 374.
"Free from any royalty over and above the purchase money." See *De La Vergne Co.* v. *Hub Brewing Co.* 419, 420, 421.
"Free of any rent or charge for taxes or otherwise." See *Bates* v. *Sharon*, 293, 295.
"Fully, plainly, substantially, and formally." See *Commonwealth* v. *Reid*, 325, 331.
"Furnace." See *Boston* v. *Sarni*, 357, 358.
"Gift." See *Opinion of the Justices*, 599, 601.
"Good of the service." See *Ayers* v. *Hatch*, 489, 492.
"Have been or are about to be." See *Brightman* v. *Bates*, 105, 109.
"I also give, bequeath and devise to my said wife for and during her natural life, the dwelling-house in which I now reside and the lot on which it stands, together with all other buildings on said lot." See *Prescott* v. *Prescott*, 64, 65.
"If without such assent." See *Goodhue* v. *Hartford Fire Ins. Co.* 187, 190.
"In the erection of a building situated on a lot." See *Muto* v. *Smith*, 175, 177.
"In the manner following." See *Attorney General* v. *Equitable Accident Insurance Association*, 196, 198.
"In the same manner," etc. See *Natick Gas Light Co.* v. *Natick*, 246, 248.
"Itinerant vendor." See *Commonwealth* v. *Reid*, 325, 328.
"It is impossible for the person injured to give the notice within the time provided in said section." See *Cogan* v. *Burnham*, 391, 392.
"Judgment." See *Dalton-Ingersoll Co.* v. *Fiske*, 15, 17.
"Judicial officers." See *Tyler* v. *Court of Registration*, 71, 80.
"Just and equitable." See *Carson* v. *Brockton*, 242, 244.
"Legal representatives." See *Thayer* v. *Pressey*, 225, 236.
"Liability (The) of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." See *Rosenthal* v. *Nove*, 559, 566.

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"May." See *Rosenthal* v. *Nove*, 559, 560.
"May . . . serve any writ or other process in a personal action in which the damages are laid at a sum not exceeding three hundred dollars." See *French* v. *Goodnow*, 451, 452.
"Mistake." See *Parke* v. *Boston*, 464, 465.
"Modified." See *Goodhue* v. *Hartford Fire Ins. Co.* 187, 189.
"Mortgage." See *McKie* v. *Gregory*, 505, 507.
"Occupied." See *Phillips Academy* v. *Andover*, 118, 122; *Harvard College* v. *Cambridge*, 145, 146.
"Orders." See *Sullivan* v. *Thorndike Co.* 41, 46.
"Originals." See *Commonwealth* v. *Corkery*, 460, 461.
"Passenger." See *Gordon* v. *West End Street Railway*, 181, 183.
"Physician and surgeon." See *Blanchette* v. *Holyoke Street Railway*, 48, 51.
"Proceeding *in rem*." See *Tyler* v. *Court of Registration*, 71, 75, 76, 83, 95, 99.
"Property within the jurisdiction of the Commonwealth." See *Frothingham* v. *Shaw*, 59, 60.
"Prosecution." See *Clinton* v. *Heagney*, 134, 136.
"Provisions." See *Commonwealth* v. *Reid*, 325, 329.
"Reasonable care and diligence." See *Parker* v. *Boston*, 501; *Martin* v. *Chelsea*, 516, 518.
"Ripe for judgment." See *Dalton-Ingersoll Co.* v. *Fiske*, 15, 22.
"Said board may designate a certain part or parts of said public way to be under the charge of the board of park commissioners of said city as a parkway," etc. See *Devine* v. *Lord*, 384, 388.
"Seizure." See *Tyler* v. *Court of Registration*, 71, 78.
"Shall be served by any officer qualified to serve civil process." See *French* v. *Goodnow*, 451, 452.
"Shall be stayed until after an adjudication." See *Rosenthal* v. *Nove*, 559, 560.
"Shall be voted at each annual meeting." See *Brightman* v. *Bates*, 105, 110.
"Specific repairs." See *Albro* v. *Fall River*, 590, 593.
"Strict accounting to her of the affairs of the estate." See *Walker* v. *Walker*, 349, 354.
"Such action may be further stayed." See *Rosenthal* v. *Nove*, 559, 560.
"Superintendence." See *Sullivan* v. *Thorndike Co.* 41, 43, 47; *McCabe* v. *Shields*, 438, 446.
"Superior Court (The) shall always be open for criminal business in every county," etc. See *Commonwealth* v. *O'Brien*, 37, 41.
"Surrender." See *Goodhue* v. *Hartford Fire Ins. Co.* 187, 189.
"Teams." See *Merrigan* v. *Hall*, 508, 509, 510.
"Thence." See *Muto* v. *Smith*, 175, 176.
"To extend the location of its tracks." See *Daniels* v. *Commonwealth Avenue Street Railway*, 518, 520.
"Tribunal." See *First National Bank of Chicago* v. *Graham*, 179, 180.
"Vacant by the removal of the owner or occupant." See *Johnson* v. *Norwalk Fire Ins. Co.* 529, 531.

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"Veteran holding an office or employment in the public service." See *Ayer* v. *Hatch*, 489, 490.
"Ways, works, or machinery." See *Campbell* v. *Dearborn*, 183, 185.
"Without modification thereof." See *Goodhue* v. *Hartford Fire Ins. Co.* 187, 189.

WRIT.

See ABSENT DEFENDANT, 1, 4, 5; INSURANCE, 1; JUDGMENT, 1; REPLEVIN; TRIAL, 15.

WRIT OF ENTRY.

1. The owner of land sold for taxes may, after payment or tender of the amount due within the time prescribed by St. 1888, c. 390, § 57, recover the land by a writ of entry, and the remedy by a bill in equity under St. 1888, c. 390, § 76, is not exclusive. *Barker* v. *Mackay*, 485.
2. The grantee in a deed, made since St. 1891, c. 354, from the purchaser at a sale of the land for taxes assessed upon the whole estate to one of two joint owners thereof, may maintain a writ of entry to recover the same against a person, who, having been in occupation as a paying tenant of the owner, upon condemnation of the premises by the board of health, vacates them and afterwards repairs them at his own expense to the satisfaction of such board, and then moves back and occupies them without paying rent for several years. *McLoud* v. *Mackie*, 355.

See EVIDENCE, 3.

WRIT OF ERROR.

A party cannot re-try his case on writ of error. *Pratt* v. *Bidwell*, 453.

WRITTEN INSTRUMENTS.

See ATTESTATION; BOND; CONTRACT; COVENANT; DECLARATION, 2, 4, 5; DEED; EVIDENCE, 22, 24–26, 28; FORECLOSURE, 1; MECHANIC'S LIEN, 2, 3; PRINCIPAL AND AGENT, 3; PROMISSORY NOTE; TRIAL, 17; VARIANCE.

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